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APPENDIX

In the

Supreme Court of the United States

October Term, 1972

No. 72-1690

Harold Orland Stenson,

Appellant,

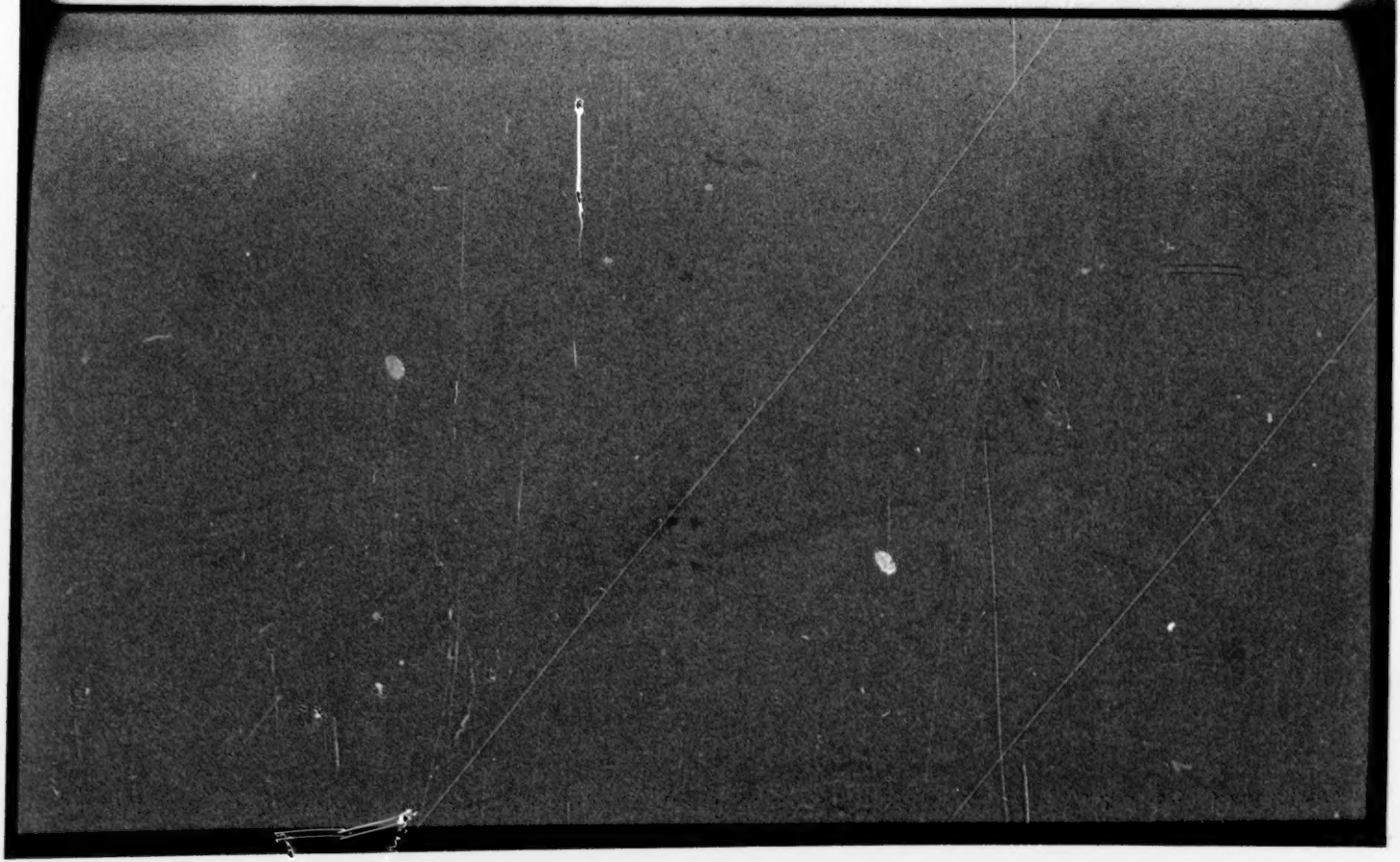
—v.—

The State of Washington,

Appellee.

On Appeal from the Supreme Court
of the State of Washington

Jurisdictional Statement Filed June 11, 1973
Probable Jurisdiction Noted October 9, 1973



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Chronological List of Docket Entries

IN THE

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 42256

STATE OF WASHINGTON,

Appellant,

v.

HAROLD OMAND SPENCE,

Respondent.

1971		
Dec.	27	Notice of Appeal
Dec.	28	Ent'd Set for hearing March 6, 1972—En Banc
Dec.	30	C/A file received (Agreed Statement of Facts; Brief of Appellant (4); Brief of Respondent (10); and exhibits (in pouch); App. Reply (1)
1972		
Feb.	7	Plaintiff's Exhibit No. 3 (Bin A-62)
1973		
Jan.	18	Opinion—The Court of Appeals is reversed and the cause remanded—En Banc
Jan.	26	Cost Bill $120.00 and service

Feb.	16	Petition for Rehearing (3) and Service
Feb.	16	Notice of Withdrawal and Substitution of Attorneys (David Allen withdraws and Peter Greenfield is substituted)
Mar.	13	Order Denying Petition for Rehearing 63/293
Mar.	13	Remitted 60/379
Apr.	10	Notice of Appeal to the Supreme Court of the United States
Apr.	10	Letter of Peter Greenfield to be considered a praecipe

Agreed Statement of Facts

IN THE

SUPERIOR COURT
OF THE STATE OF WASHINGTON

IN AND FOR KING COUNTY

No. 54474

(Court of Appeals No. 85[illegible])

STATE OF WASHINGTON,

Respondent,

vs.

HAROLD OMOND SPENCE,

Appellant.

Appeal from the Superior Court for KING County

THE Honorable Charles R. Denny, Judge Pro-Tempore

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The following agreed statement is presented by defendant-appellant in lieu of a record on appeal, and is submitted pursuant to CAROA 34 (4).

I.

BACKGROUND

1. The defendant is Mr. Harold Omond Spence.
2. The defendant-appellant's attorney is Mr. David Allen.
3. The plaintiff-respondent is the State of Washington and is represented by Mr. James Warme, Deputy Prosecuting Attorney of King County.
4. The defendant was charged by complaint with committing the crime of "improper use of flag prohibited", RCW 9.86.020 on May 10, 1970.
5. The defendant pleaded not guilty and was tried before the Honorable Charles M. Stokes, sitting without a jury, in the King County Justice Court on July 10, 1970.
6. Defendant was found guilty and sentenced to 90 days in the county jail, 60 days suspended on the condition that defendant pay court costs.
7. The defendant appealed this judgment to the Superior Court of King County.

II.

NARRATIVE STATEMENT OF ORAL PROCEEDINGS AT SUPERIOR COURT TRIAL

The issues in this action came to trial before the Honorable Charles R. Denny, Judge Pro Tempore, in the Superior Court of King County on October 14, 1970. The defendant,

through his attorney, made a motion to dismiss the complaint on the ground that the statute charging the offense was unconstitutional on its face because it was overly broad and unduly vague. The court denied this motion. The defendant introduced and the court admitted, copies of two newspapers (which were identified as exhibit numbers one and two) for the purpose of showing violations of this statute to demonstrate the overbreadth of the law.

A jury was then impanelled, accepted and sworn.

The uncontroverted testimony of the states witnesses, three Seattle police officers, was: they observed a flag with a masking tape peace symbol attached thereto, hanging out of a window at 1006 E. Prospect Street, Seattle, Washington; they entered the main door of the apartment building and were met by the defendant who said, "I suppose you are here about the flag. I didn't know there was anything wrong with it. I will take it down"; the defendant allowed the officers to enter his apartment where the flag was located; the officers arrested the defendant and seized the flag; the defendant co-operated with its police officers.

The state introduced, and the court admitted, the flag with the masking tape peace symbol. (It was identified as Exhibit No. 3). The state rested its case.

The defendant, Mr. Spence, took the stand and testified on his own behalf. The defendant testified that he put a peace symbol on the flag and displayed it to public view as a protest to the invasion of Cambodia, and the killings at Kent State University, both of which had occurred a few days previously. Mr. Spence said his purpose of putting the peace symbol on the flag was to associate the American flag with peace instead of war and violence. He testified that he choose masking tape so that the peace symbol could

be removed without damaging the flag. He said that he did not know that placing masking tape on a flag was against the law.

His attorney, David Allen, asked him, "Would you have done this act if you had known it was against the law?"

The plaintiff objected to this question as being irrelevant and the judge excused the jury from the court room. After argument of both counsel the judge sustained plaintiff's objection and held that specific intent to violate the law was not an element of the crime of "improper use of the flag prohibited", RCW 9186.020.

The defense rested.

The plaintiff and defendant submitted proposed jury instructions. The defendant took exception to the court's instructions numbers 2 and 3 as being contrary to the law in the case.

The defendant took exception to the court's not accepting defendant's requested jury instructions numbers 1, 2, and 3.

The jury retired and returned with a verdict of guilty.

The defendant moved for a new trial since the jury was not consistent with the law in the case. Said motion was denied.

The defendant was sentenced to 10 days in jail, all suspended, seventy-five dollar fine, and ordered to pay court costs.

III.

DEFENDANT'S REQUESTED INSTRUCTIONS TO THE JURY

IN THE

SUPERIOR COURT
OF THE STATE OF WASHINGTON

FOR KING COUNTY

No. 54474

STATE OF WASHINGTON,

Plaintiff,

vs.

HAROLD OMAN SPENCE,

Defendant.

DEFENDANT'S REQUESTED INSTRUCTIONS TO THE JURY

COMES Now the defendant, Harold Oman Spence, and respectfully requests the court to give the following instructions to the jury.

DAVID ALLEN and
EDMUND J. WOOD
/s/ David Allen
Attorneys for Defendant

American Civil Liberties Union
Union of Washington
2101 Smith Tower
Seattle, Washington 98104

NO. 1

You are instructed that the statute under which the defendant is charged by its terms, prohibits a person from publicly doing acts in connection with the United States flag. Its purpose is to place a limitation on speech and action. However, because of constitutional guarantees of freedom of speech, state legislatures may limit speech only to the extent necessary to preserve public order. Therefore, you are instructed that even if you find from the evidence beyond a reasonable doubt that the defendant did the act charged, unless you further find from the evidence beyond a reasonable doubt that the act occurred in circumstances likely to produce a clear and present danger of a serious substantive evil rising far above public inconvenience, annoyance, or unrest, then your verdict must be for the defendant and you will find him not guilty.

INSTRUCTION NO. 2

If you find from the evidence beyond a reasonable doubt that the defendant placed a figure, mark, design, drawing or advertisement upon the flag then it will be your duty to determine whether under the evidence such act was done in a manner prescribed by the statute.

In determining whether the defendant's conduct, if any, came within the meaning of the statute, it is not enough for you to find that such an act would stir members of the public generally to anger, or to strike at public prejudices and preconceptions, or is profoundly unsettling, for the state is prohibited from prescribing what shall be orthodox in politics, nationalism, religion, or other matters of opinion or to force citizens to revere and respect the flag.

INSTRUCTION NO. 3

If you find from the evidence beyond a reasonable doubt that the defendant placed a figure, mark, design, drawing or advertisement upon the flag then it will be your duty to determine whether under the evidence such act was done in a manner prescribed by the statute.

You are instructed that the statute is not violated unless, in addition to finding that the defendant did the physical acts alleged, you find that the acts were performed with the knowledge that they were illegal and with an intent to violate the statute.

IV.

COURT'S INSTRUCTIONS TO THE JURY

IN THE

SUPERIOR COURT
OF THE STATE OF WASHINGTON

FOR KING COUNTY

No. 54474

STATE OF WASHINGTON,

Plaintiff,

v.

HAROLD O. SPENCE,

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

October , 1970 CHARLES R. DENNEY, *Judge*

NO. 1

MEMBERS OF THE JURY:

The defendant Harold O. Spence is charged by a complaint filed by the state of Washington with the crime of improper use of the flag, alleged to have been committed as follows:

He, the said Harold O. Spence, in the county of King, state of Washington, on or about the 10th day of May, 1970, willfully, unlawfully and knowingly for exhibition and display, did expose to public view a flag of the United States upon which there was then and there attached and affixed a mark, picture, design or drawing, to-wit: a large black circle with connecting straight lines within.

To this complaint the defendant has entered a plea of not guilty, which plea puts in issue every material allegation contained in the complaint.

NO. 2

To convict the defendant of the offense of improper use of the flag, the state must prove beyond a reasonable doubt:

(1) That on or about the 10th day of May, 1970, the defendant exhibited an American flag for public display;

(2) That there was attached to such flag a mark, picture, design or drawing, to-wit: a black circle with connecting straight lines within;

(3) That the above acts occurred in King County, Washington.

If you find from the evidence admitted in this case that the state has proved beyond a reasonable doubt the foregoing elements of the crime charged in the complaint, then it will be your duty to return a verdict of guilty of improper use of the flag.

On the other hand, if after weighing all of the evidence and lack of evidence you then entertain a reasonable doubt as to the establishment of any one of the foregoing elements, you should return a verdict of not guilty.

NO. 3

It is not required that you find that the defendant had any specific intent in doing the acts charged, if he did so. It is sufficient in this regard if it be proven beyond a reasonable doubt that the defendant intended to and did perform the physical act charged in the complaint and defined by these instructions. Ignorance of the law is no defense.

NO. 4

You are instructed that the law presumes a defendant to be innocent until proven guilty beyond a reasonable doubt. This presumption is not a mere matter of form, but it is a substantial part of the law of the land, and it continues throughout the entire trial and until you have found that this presumption has been overcome by the evidence beyond a reasonable doubt.

The jury is further instructed that the doubt which entitles the defendant to an acquittal must be a doubt for which a reason exists. You are not to go beyond the evidence to hunt up doubts, nor must you entertain such doubts as are merely vague, imaginary, or conjectural. A reasonable doubt is such a doubt as exists in the mind of a reasonable man after he has fully, fairly, and carefully compared and considered all of the evidence or lack of evidence introduced at the trial. If, after a careful consideration

and comparison of all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

NO. 5

You are the sole and exclusive judges of the evidence and of the credibility of the several witnesses and of the weight to be attached to the testimony of each. In weighing the testimony of a witness you have a right to consider his demeanor upon the witness stand, the apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the testimony such witness relates and the interest, if any, you may believe a witness feels in the result of the trial, and any other fact or circumstances arising from the evidence which appeals to your judgment as in anywise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to.

You will be slow to believe that any witness has testified falsely in the case, but if you do believe that any witness has willfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely except insofar as the same may be corroborated by other credible evidence in the case.

NO. 6

Under the constitution and laws of this state, the court is prohibited from commenting upon the facts in this case or upon the credibility of any witness who has testified

before you. The court has not intentionally commented upon the facts in this case or upon the credibility of any witness who has testified before you, but if it has seemed to you that during the course of the trial, or in the giving of these instructions, the court has said or done anything that would appear to be commenting upon the facts or upon the credibility of any witness, it is your duty to entirely disregard the same, and determine the facts solely from the evidence that has been admitted in the case.

NO. 7

It is the duty of the court to instruct you on the law governing this case. It is your duty to accept the court's statement of the law notwithstanding any opinion of your own that the law is different or ought to be different than the court states it to be.

NO. 8

In conclusion let me remind you that each of you has taken a solemn oath that you will well and truly try this case and a true verdict render upon the evidence given in the trial and upon the law as now given you by the court. You have nothing whatever to do with the punishment to be inflicted in case of a violation of law. The fact that punishment may follow a conviction cannot be considered by you except insofar, and only so far, as it may tend to make you careful. Neither must you allow yourselves in the least to be moved by sympathy or influenced by prejudice. The question of guilt or innocence is a question of fact, not a question of prejudice or what shall the punishment be. If, as a matter of fact, from the evidence a defendant is

guilty, no amount of sympathy will make a defendant innocent. If a defendant is innocent, no amount of prejudice will make him guilty; for regardless of what the penalty may be, regardless of any feelings of prejudice, a defendant is upon the evidence, and the evidence alone, either guilty or not guilty. What is the true verdict as shown by the evidence is the one question before you.

This being a criminal case, it will require your entire number of twelve to return a verdict.

NO. 9

In retiring to deliberate upon your verdict, you will select one of your number to act as foreman, whose duty it will be to sign whatever verdict you agree upon.

You will take to the jury room the exhibits which have been admitted in evidence, these instructions, and a verdict.

You will fill in the blank in such verdict the word "guilty" or the words "not guilty" according to the determination you reach.

VERDICT

IN THE

SUPERIOR COURT
OF THE STATE OF WASHINGTON

FOR KING COUNTY

No. 54474

STATE OF WASHINGTON,

Plaintiff,

vs.

HAROLD O. SPENCE,

Defendant.

We, the jury in the above-entitled cause, do find the defendant Harold O. Spence ..... of the crime of improper use of the flag ....., as charged.

.....

Foreman

V.

STIPULATION OF COUNSEL

It is hereby stipulated by and between counsel for the plaintiff and defendant that this narrative statement of the proceedings had in the trial of said cause shall be used as a record on appeal in place of a reporters transcript as provided by CAROA 34(4).

DAVID ALLEN
Attorney for Defendant

JAMES WARME
Deputy Prosecuting Attorney
Attorney for Plaintiff

VI.

ASSIGNMENT OF ERRORS

The defendant-appellant assigns errors to the following:

1. Failure of the court to grant defendant's motion to dismiss charges on the ground that the statute was overly broad and unduly vague and, therefore, unconstitutional;
2. Failure of the court to submit defendant's requested jury instructions numbered 1, 2 and 3;
3. Failure of the court to sustain defendant's exception to the giving of court's instruction to the jury, numbered 1 and 2;

4. The court's sustaining prosecutor's objection to defendant answering the question: "Would you have done this act if you had known it was against the law."

5. Failure of the court to grant defendant's motion for a new trial;

VII.

CERTIFICATION OF AGREED STATEMENT OF FACTS BY TRIAL JUDGE

STATE OF WASHINGTON)
)
COUNTY OF KING)

I, CHARLES R. DENNY, Judge Pro-Tempre of the Superior Court of the State of Washington, in and for the County of King, therein and the Judge before whom the above-entitled cause was tried,

DO HEREBY CERTIFY:

That the matters and proceedings embodied in the foregoing agreed statement of facts are matters and proceedings occurring in the said cause, and the same are hereby made a part of the record therein;

That the above and foregoing statement of facts contains the court's instructions given upon the trial of this said cause; and also the ruling of the court upon motions and new trials herein, after certain proceedings thereon;

That the above and foregoing statement of facts was duly and regularly filed with the clerk of said court and thereafter duly served within the time authorized by law;

That the exhibits referred to in said statement of facts are directed to be, and hereby are made a part of said statement, except as to the proceedings herein through stipulation of counsel, and the consent of the court, show are not made a part thereof.

Dated at Seattle, Washington, this 27th day of January, 1971.

/s/ Hon. Charles R. Denny
Judge-Pro Tempore

Opinion of the Court of Appeals of Washington

[No. 854-1. Division One—Panel 1. November 15, 1971.]

THE STATE OF WASHINGTON, *Respondent*, v. HAROLD OMAND SPENCE, *Appellant*.

[1] Criminal Law—Appeal and Error—Review—Specific Crime Charged. Under the sixth amendment to the United States Constitution and Const. art. 1, § 22 (amendment 10) an appellate court must confine its review of the conviction appealed from to the violation actually charged.

[2] Flags—Use and Display—Criminal Prosecutions—Review. When a defendant is charged with violating RCW 9.86.020(1) and (2) and 9.86.010 dealing with improper flag use, and not charged with RCW 9.86.030 as amended which has heretofore been construed to include flag desecration, an appellate court must confine its review to the violation actually charged.

[3] Flags—Constitutional Law—Freedom of Speech—Flag Symbolism. The use of the United States flag or a representation thereof as a symbol of ideas is subject to the proper exercise of the state's police power to the extent that such regulation does not become a constitutionally impermissible restriction of the right of free speech.

[4] Flags—Constitutional Law—Freedom of Speech—Words Offensive to Sensibilities. Under the First Amendment as heretofore construed, even defiant or

contemptuous words spoken of the flag are protected free speech, and the fact that the words are offensive to the sensibilities of the average citizen is not the controlling test of whether the words are constitutionally protected free speech.

[5] Flags—Constitutional Law—Freedom of Speech—Symbolic Speech—In General. Thoughts and ideas, when conveyed by nonspeech symbols, constitute symbolic speech and are protected by the First Amendment. These include symbols not charged to have been used to show disrespect for the flag or used for the purpose of defiling or desecrating the flag and involving no physical destruction of any part thereof.

[6] Constitutional Law—Freedom of Speech—Conflict With Governmental Interests—Balancing. There must be an evaluation and balancing of competing interests when governmental and societal interests conflict with the constitutional right of free speech. Before a state's police power may be deemed to override the First Amendment there must be a state interest to be protected unrelated to the suppression of free expression, and the statutory restriction must be no greater than is essential to the furtherance of that interest. A restriction so broad that it strikes where no interest is served other than the proscription of expression is constitutionally impermissible.

[7] Flags—Constitutional Law—Freedom of Speech—Conflict With Governmental Interests—Flag Use. Under the First Amendment, the statutory prohibition of the act of affixing a symbol to the American flag and displaying the flag with the symbol so affixed

is not constitutionally permissible when the scope of the prohibition is not limited to protecting proper societal or governmental interests. To the extent that the prohibition is not so limited, the statute violates the constitutional principle that the statutory restriction must be one unrelated to the suppression of free expression and not broader than essential to the furtherance of that interest. Accordingly, the suppression of free expression of ideas by means of a symbol affixed to the national flag, involving neither desecretion nor destruction thereof, violates the First Amendment in the absence of narrowly drawn restrictions no broader than essential to the furtherance of governmental or societal interests the nature of which has been in part heretofore judicially determined.

[8] Flags—Constitutional Law—Freedom of Speech—Symbolic Speech—Attachment to Flag—Effect. A physical symbol which would be protected symbolic speech when displayed away from the flag even though in closest proximity thereto does not lose its constitutional protection solely because it is placed on the flag displayed.

[9] Flags—Statutes—Validity—Constitutionality—Overbreadth—What Constitutes. A statute relating to flag use is constitutionally overbroad if, while serving valid governmental or societal interests, it speaks in such broad terms as to impair, prohibit, or have a chilling effect upon the exercise of otherwise permissible free expression. Nothing in the doctrine of overbreadth derogates from the view that the American flag is entitled to our affection and respect.

[10] Statutes—Validity—Constitutionality—First Amendment Rights—Burden of Proof. When the issue is whether a statute violates the First Amendment there is no presumption that the statute attacked is constitutional and the state has a heavy burden to demonstrate that the limitation challenged is constitutionally permissible.

[11] Statutes—Validity—Constitutionality—First Amendment Rights—Standing to Challenge. Ordinarily one charged with violating a criminal statute has no standing to challenge the validity of the statute on account of overbreadth if he is not the victim of overbreadth. In a First Amendment case, however, he may rely on overbreadth on the face of the statute even if he thereby asserts that doctrine as to others and is not himself the victim of the overbreadth.

[12] Flags—Use and Display—Statutory Provisions—Validity. RCW 9.86.020(1) and (2), taken in conjunction with RCW 9.86.010 which forbids certain exhibition or display of the state or federal flag or representations thereof, are invalid as unconstitutionally overbroad.

WILLIAMS, J., dissents by separate opinion.

Appeal from a judgment of the Superior Court for King County, No. 54474, Charles R. Denny, J. Pro Tempore, entered October 29, 1970. *Reversed.*

Prosecution for improper display of the flag. Defendant appeals from a conviction and sentence.

David Allen, for appellant.

Christopher T. Bayley, Prosecuting Attorney, and *James E. Warme, Deputy*, for respondent.

HOROWITZ, C.J.—Defendant, after jury trial, was convicted of violating RCW 9.86.020(1) and (2), which forbids the improper use for exhibition or display of any flag of the United States as therein defined. On appeal he contends his conviction should be reversed and the charge dismissed because the statute violates his First Amendment rights. For the reasons next stated, we uphold his contention.

RCW 9.86.020(1) and (2) provide:

> No person shall, in any manner, for exhibition or display:
>
> (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or
>
> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement.

RCW 9.86.010 defines the word flag as follows:

> The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

The facts are these: Defendant, by the use of removable plastic tape, superimposed a peace symbol upon an American flag in his possession. He then displayed the flag containing the peace symbol to public view by hanging it out of his apartment window in Seattle, Washington, in an upside-down position. The plastic tape peace symbol consists of black lines forming a circle, which in turn contains black straight lines in much the form of an inverted trident. Defendant testified that his purpose in placing the peace symbol upon the flag displayed was to associate the flag with peace instead of war and violence, and to serve as a protest to the invasion of Cambodia and the killings at Kent State University, both of which events had occurred a few days before. He testified that he did not know that placing the plastic tape peace symbol upon the flag was against the law.

[1, 2] The state does not contend the information charged defendant with desecrating the flag—flag desecration being prohibited by RCW 9.86.030 as amended. Had flag desecration been the intended charge, it would have been necessary to include an allegation, in substance or effect, that defendant had committed "acts . . . done knowingly and intentionally with an intent or purpose of defiling and desecrating [the flag] or holding it publicly up to contempt." *State v. Turner*, 78 W.D.2d 276, 280, 474 P.2d 91 (1970). It is not claimed that such an intent was alleged in the information, nor is such intent relied upon to uphold the conviction below under RCW 9.86.020. Indeed, the state successfully contended below that intent to violate the statute under which the information was drawn was an unnecessary ingredient of the offense charged. We therefore confine ourselves, as we must, to a consideration of the actual charge on which defendant was convicted. U.S. Const.,

amend. 6; Const. art. 1, § 22 (amendment 10). As stated in *State v. Frazier*, 76 Wn.2d 373, 456 P.2d 352 (1969), at 376: "He cannot be accused of one crime and convicted of another."

[3] A flag may be considered from two aspects: (1) as a physical object, and (2) as a symbol of ideas. As a physical object, its ownership is subject to the proper exercise of the state's police power (*see* Cross, *The Diminishing Fee*, 20 Law & Contemp. Prob. 517 (1955), cited in *Sutherland v. Southcenter Shopping Center, Inc.*, 3 Wn. App. 833, 847 n.6, 478 P.2d 792 (1970)), and such ownership is protected by the Fifth and Fourteenth Amendments implemented, for example, by laws relating to trespass. As a symbol, its regulation is also subject to the proper exercise of the state's police power, but the use of the symbol is protectable, if at all, by the First and Fourteenth Amendments which provide a restraint upon the exercise of police power. *See Halter v. Nebraska*, 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419 (1907); *State v. Oyen*, 78 W.D.2d 934, 937, 480 P.2d 766 (1971); Annot., 22 L. Ed. 2d 972 (1970).

The basic question here involves a determination of whether the constitutional right of free speech (U.S. Const. amend. 1; Const. art. 1, § 5;[1] *Adams v. Hinkle*, 51 Wn.2d 763, 322 P.2d 844 (1958)) is violated by RCW 9.86.020(1) and (2) enacted under the state's police power, either as that statute is applied to defendant or on account of overbreadth.

Flags have a long and worldwide history. 9 Encyclopedia Britannica 398, *Flags* (22d ed. 1970); E.M.C. Barraclough,

---

[1] Because the First Amendment provides an adequate basis for the disposition of the question involved, it is unnecessary to determine whether article 1, section 5 compels a like conclusion. Reference to the American flag applies by a parity of reasoning to the state flag.

Flags of the World (Rev. ed. 1965); Quaife, The Flag of the United States (1942). They serve a variety of functions. Thus, they may be used as a reminder of an historic past, a mirror of a peaceful or turbulent present, and a promise of conditions hoped for or of events to come. The American flag is similarly used. The American flag, however, has its own communicating function. Its content finds expression and use based on American experience, American values and American outlook. The flag does not bear a single message, orthodox or unorthodox; nor is it the sole preserve of government or the sole preserve of any one person, group or interest. It does not serve to freeze past or existing institutions or past or existing points of view. Born out of the vicissitudes of change, and itself a striking and eloquent manifestation of that change, it would be strange indeed if it proved inhospitable to the constitutionally protected appeal for change by lawful means. Hence, the flag is both an appeal for loyalty to existing America, its policies and its ideals, and an invitation for peaceful change to bring America closer to heart's desire. In short, the American flag is an identifying, history-preserving and ideological symbol. As stated in *Parker v. Morgan*, 322 F. Supp. 585 (W.D. N.C. 1971), at 588:

> If the flag says anything at all, and we agree it often may in a given context, we think it says everything and is big enough to symbolize the variant viewpoints of a Dr. Spock and a General Westmoreland. With fine impartiality the flag may head up a peace parade and at the same time and place fly over a platoon of soldiers assigned to guard it.
>
> . . . Sometimes the flag represents government. . . . Always it represents America—in all its marvelous diversity.

It is understandable that a concern for the preservation of the flag's symbolism should find expression, all over the land and in a variety of contexts, in federal and state statutes designed to protect the American flag and representations of that flag against both misuse and disrespect. *See e.g.,* 4 U.S.C.A. §§ 1-3; 36 U.S.C.A. §§ 172-178, 182; RCW 9.86.010-.070 (Uniform Flag Law); RCW 9.05.100-.140. Indeed, a body of law—albeit somewhat small—has developed with respect to how statutory enactments dealing with the flag should be regarded. *See generally,* 35 Am. Jur. 2d, *Flags* §§ 1-5 (1967, Supp. 1971); 36A. C.J.S., *Flags* §§ 1-6 (1967, Supp. 1971); Annot., 22 L. Ed. 2d 972 (1970); Note, *Exploiting the American Flag: Can the Law Distinguish Criminal from Patriot?,* 30 Maryland L. Rev. 332 (1970).

[4, 5] From the case law it is clear that even defiant or contemptuous words spoken of the flag are protected free speech; and the fact that the words would be offensive to the sensibilities of the average citizen is not a controlling consideration. *Street v. New York,* 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969). Thought and ideas, however, may be conveyed by nonspeech symbols as well as by words. Such symbols when so used constitute symbolic speech which is protected by the First Amendment. *Tinker v. Des Moines School Dist.,* 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969). Furthermore, a statute mandating respect for the flag, as in the case of a compulsory flag salute, is a violation of the First Amendment. *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, 147 A.L.R. 674 (1943). Even the display of an alien red flag symbolizing opposition to the American government is constitutionally protected free speech.

Stromberg v. California, 283 U.S. 359, 75 L. Ed. 1117, 51 S. Ct. 532, 73 A.L.R. 1484 (1930).

It might be suggested that the state has the right to regulate the nonspeech aspects of conduct as long as the regulation does not impair or regulate speech itself. *Cf., Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 93 L. Ed. 834, 69 S. Ct. 684 (1949); *Adderley* v. *Florida,* 385 U.S. 39, 17 L. Ed. 2d 149, 87 S. Ct. 242 (1966). This view is the rationale, for example, of the majority opinion in *People v. Radich,* 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970), affirmed per curiam by an equally divided court, 402 U.S. 989, 28 L. Ed. 2d 287, 91 S. Ct. 1217 (1971). Whatever workability this rule may possess in the presence of actual speech, the rule may well be unworkable in the presence of conduct which itself is constitutionally protected symbolic speech and is nonseverable therefrom. Thus, the wearing by high school students of black armbands to protest American policy in Vietnam is conduct and is nonseverable from the symbolic speech exemplified by the armbands (*Tinker v. Des Moines School Dist., supra*); and a compulsory flag salute statute which regulates or mandates conduct also runs afoul of constitutional provisions which prevent government from prescribing what is "orthodox in politics, nationalism, religion, or other matters of opinion . . ." *West Virginia State Bd. of Educ. v. Barnette, supra,* Mr. Justice Jackson at page 642. *See also Stromberg v. California, supra,* and *Gregory v. Chicago,* 394 U.S. 111, 22 L. Ed. 2d 134, 89 S. Ct. 946 (1969).

[6] It has also been pointed out that the constitutional right of free speech is not absolute and does not automatically and mechanically prevail against statutes protecting legitimate governmental interests by prohibition or regulation of designated conduct with respect to the flag. Thus, a

statute may prohibit the use of a flag for commercial advertising purposes (*see Halter v. Nebraska, supra*); or a statute may protect the dignity of a foreign flag pursuant to an obligation imposed by international law (1 L. Oppenheim, International Law § 121 (7th ed. 1948); 2 G. Hackworth, Digest of International Law § 127 (1941); G. Wilson, *Respect for National Flag*, 29 Am. J. of Int'l Law 662 (1935)); or a statute may protect the flag if so to do protects the safety of the state against a clear and present danger. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 86 L. Ed. 1031, 62 S. Ct. 766 (1942); *Schenck v. United States*, 249 U.S. 47, 63 L. Ed. 470, 39 S. Ct. 247 (1919); *State ex rel. Holcomb v. Armstrong*, 39 Wn.2d 860, 239 P.2d 545 (1952). It is conceivable, although we do not determine the matter, that a statute may properly seek to preserve a privately owned flag of historic importance; or a statute may protect the identifying function of the flag at home and abroad against substantial impairment; or a statute may regulate the form of a military salute in America's armed forces. Furthermore, it may be assumed that a statute may properly protect the encouragement of love of country. *See Halter v. Nebraska, supra.* These are independent and protectable governmental interests.

The problem of reconciling protection of legitimate governmental interests with the demands of free speech calls for an evaluation of competing interests and the striking of a balance that will mark the boundaries between what is constitutionally permissible and what is constitutionally impermissible. *See State v. Oyen*, 78 W.D.2d 934, 943-44, 480 P.2d 766 (1971). The doctrine of balancing was articulated in *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), a draft card burning case. *O'Brien* held that before a state's police power would be

deemed to override the First Amendment there would have to be a state interest to be protected "unrelated to the suppression of free expression," and the statutory restriction would have to be "no greater than is essential to the furtherance of that interest." 391 U.S. at 377. The statute may not be "so broad that it strikes where no interest is served other than the proscription of expression." *Hodsdon v. Buckson*, 310 F. Supp. 528, 534 (Del. 1970).

[7] In our opinion the statutory prohibition of the act of affixing a peace symbol to the American flag and displaying the flag with the peace symbol so affixed from a window is not constitutionally permissible as protection of a societal or governmental interest "unrelated to the suppression of free expression" as required by *O'Brien*. The prohibition of defendant's conduct does not fall within the class of any of the constitutionally permissible prohibitions already discussed, nor are the possible societal interests listed by Mr. Justice Harlan in *Street v. New York, supra*, available as justification for the statutory prohibition concerning the flag use involved here. The interests held insufficient to justify the prohibition of words critical or even contemptuous of the flag are discussed as follows by Mr. Justice Harlan in *Street v. New York, supra*:

> (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passersby who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words

upon others, showed proper respect for our national emblem.

394 U.S. at 591. If such interests are insufficient with respect to *words* considered in *Street v. New York, supra,* critical or contemptuous of the flag, they would clearly be insufficient as to *symbols* used conveying the same meaning as the words themselves; and a fortiori they would be insufficient as to symbols respectful of the flag and involving no physical destruction of any part thereof, the flag in conjunction with the peace symbol being used to passively communicate a constitutionally protected message. To prohibit defendant's conduct in the instant case when such conduct is nonseverable from a constitutionally protected message may in effect constitute a prohibition of free speech itself, and thus be violative of the First Amendment as construed in *United States v. O'Brien, supra.*

[8] The next question presented, therefore, is whether a peace symbol, which would be protected symbolic speech if used away from the flag (*see Street v. New York, supra; Stromberg v. California, supra; Tinker v. Des Moines School Dist., supra; West Virginia State Bd. of Educ. v. Barnette, supra*), has no such special constitutional protection when the peace symbol is placed upon the flag itself. If the flag mirrors American experience, past and present; and if respect for the flag cannot constitutionally be compelled by a mandatory flag salute; and if symbolic opposition to the flag cannot be prohibited; and if symbolic as well as actual speech is entitled to constitutional protection; and if the suppression of free expression cannot be upheld in the absence of an independent governmental interest to be protected, unrelated to the suppression of free expression and not broader than is necessary for that pur-

pose; and if offense to the sensibilities of the average citizen is not enough to condemn the exercise of free speech—can it be said to really matter, on a balancing of interests, whether the words or symbols are used away from the flag or representations thereof even though in closest proximity thereto, or whether such words or symbols are used on the flag itself. The case nearest in point on this issue—apart from flag desecration cases involving the flag itself already cited—the rationale of which is applicable here, is *Long Island Vietnam Moratorium Comm. v. Cahn*, 437 F.2d 344 (2d Cir. 1970). That case, in a unanimous opinion by Chief Judge Lumbard, held that a peace symbol placed on a representation of the American flag was protected symbolic speech and that the New York Flag Use Statute (General Business Law of New York § 136(a), substantially identical with RCW 9.86.020(1) and (2)) violated the First Amendment because overbroad, vague and permitting selective enforcement of "only that expression which local officials will tolerate." 437 F.2d at 350. The court could see no difference in principle between its case and the words in *Street v. New York, supra.* Neither can we.

The doctrine of *Long Island Vietnam Moratorium Comm. v. Cahn, supra,* is necessarily supported by recent federal cases involving the flag itself that have invalidated flag desecration statutes as violative of the First Amendment because of overbreadth and vagueness. *Parker v. Morgan*, 322 F. Supp. 585 (W.D. N.C. 1971); *Hodsdon v. Buckson, supra; Crosson v. Silver*, 319 F. Supp. 1084 (Ariz. 1970). The case law on the validity of flag desecration statutes is not unanimous, however. *See inter alia State v. Turner*, 78 W.D.2d 276, 474 P.2d 91 (1970), in which the validity of former RCW 9.86.030 is assumed; *Sutherland v. DeWulf*, 323 F. Supp. 740 (S.D. Ill. 1971); *People v. Radich, supra;*

Hoffman v. United States, 256 A.2d 567 (D.C. Ct. App. 1969); *Joyce v. United States*, ... F.2d ..... (D.C. Cir., 1971), slip opinion, October 26, 1971. The instant case does not involve flag desecration and we need not determine whether the conclusion reached here concerning improper flag use likewise applies to flag desecration.

[9] It should be noted that the decisions invalidating flag-desecration statutes or improper-use statutes do not hold that a flag-use statute or a flag-desecration statute cannot under any circumstances be enacted. We have already pointed out that a state may protect a governmental interest under the limitations recognized in *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). The statute, however, cannot speak in such broad terms as to impair, prohibit or have a chilling effect upon the exercise of constitutionally protected rights of free speech. As stated in *NAACP v. Button*, 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963), "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms" (371 U.S. at 438) because these freedoms need "breathing space to survive" (371 U.S. at 433).

[10, 11] When the issue is whether a statute violates the First Amendment, it was recognized in *Adams v. Hinkle*, 51 Wn.2d 763, 322 P.2d 844 (1958), following the federal rule, that there is no presumption that the statute attacked is constitutional and that " 'the State has a heavy burden to demonstrate that the limitation challenged . . .' " is constitutionally valid. 51 Wn.2d at 769. Furthermore, a defendant charged with violating a statute ordinarily has no standing to assert the doctrine of overbreadth if he is not its victim (*State v. Cashaw*, 4 Wn. App. 243, 480 P.2d 528 (1971)); yet in a First Amendment case he does have stand-

ing to rely upon overbreadth on the face of the statute in either federal or state courts even if he thereby asserts overbreadth as to others. *United States* v. *Raines*, 362 U.S. 17, 21-22, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960); *Dombrowski v. Pfister*, 380 U.S. 479, 486, 14 L. Ed. 2d 22, 85 S. Ct. 1116 (1965); *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 84 L. Ed. 1093, 60 S. Ct. 736 (1940); *Fort v. Civil Service Comm'n*, 61 Cal. 2d 331, 392 P.2d 385, 389-90, 38 Cal. Rptr. 625, 630 (1964); *In re Davis*, 242 Cal. App. 2d 645, 51 Cal. Rptr. 702, 716-17 (1966); 2 C. Antieau, Modern Constitutional Law § 15.23 (1969).

Should overbreadth exist the statute itself may be invalidated, or the overbroad application of the statute to the defendant will be negated. As stated in *NAACP v. Button*, *supra* at 432:

> [I]n appraising a statute's inhibitory effect upon [First Amendment] rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.

Such an approach lessens the danger of tolerating "a penal statute susceptible of sweeping improper application." *NAACP v. Button*, *supra* at 432-33. *See generally*, R. Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L. J. 599 (1962); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970); Note, *Exploring the American Flag: Can the Law Distinguish Criminal From Patriot?*, 30 Maryland L. Rev. 332 (1970).

[12] The instant case illustrates overbreadth on the face of RCW 9.86.020(1) and (2), not only with respect to the American flag itself, but also with respect to the items

included in the statutory definition of the flag. RCW 9.86.010 makes it plain that the statutory prohibition is not limited to the flag itself. It also extends to any "flag, standard, color, ensign or shield, . . . or copy, picture, or representation thereof . . . of any size, evidently purporting to be such . . . of the United States or of this state . . ." We need only consider the application of the statute to a representation of the flag, as distinguished from other items included in the flag definition, to make the point of overbreadth and illustrate its consequences. Thus it is arguable, although we need not determine the matter, that the definition, when read in conjunction with RCW 9.86.020, would have prohibited both the use of a picture of the flag over the words as was done by the Seattle Post-Intelligencer in its July 4, 1970 edition (Seattle Post-Intelligencer, July 4, 1970 at page 1), and the publication by the Seattle Times of a picture of the American flag on which a person's picture might be said to have been superimposed (Seattle Times, June 14, 1970 § A, page 1). (Appellant's exhibits 1 and 2.) Patriotic, public-spirited or ideological slogans such as "love America," "liberty," "brotherhood," "to our honored dead," or even "July 4, 1776," if placed upon a picture of the flag, would be illegal. It would also be illegal to continue the long practice of using the flag or its representation in conjunction with the symbols prohibited by the statute notwithstanding the fact that this practice has been a traditional mode of free expression commonly used by both major and minor political parties throughout our history.

It would be irresponsible to suggest that the common use of flag representations to provide ideological emphasis or support for words or symbols considered public-spirited or patriotic, or in the course of political campaigns, proceeds

upon any assumption other than the assumption that the use is entirely lawful and, to the more sophisticated at least, that such use is protected free speech. It must be remembered, however, that the right of free speech, symbolic or actual, is not limited to a message orthodox and uncontroversial, nor is it limited to words or symbols that would not affront the average citizen's sensibilities in the absence of a protectable governmental interest requiring otherwise. *See e.g., Street v. New York,* 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969); *United States v. O'Brien, supra; West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, 147 A.L.R. 674 (1943). It is not suggested that the constitutionality of a statute be determined by the logical application of a widely held public opinion. This is because wishes expressing strongly held values and constitutional text may differ. Should such a difference exist, it would be our duty to follow the text. Yet if the text speaks in general terms requiring implementing definition by the court, such implementing definition must be a rational and reasonable one. Should the implementing definition be in conformity with the logical implications of publicly held values, the rational character of the implementing definition would be supported by that fact. We think that support exists here.

This being a First Amendment case, the defendant, even though not the victim of the overbreadth described in *Long Island Vietnam Moratorium Comm. v. Cahn, supra,* with respect to flag representations, nevertheless has standing to take advantage of the overbreadth doctrine. *See United States* v. *Raines, supra; Dombrowski v. Pfister, supra; Thornhill v. Alabama, supra; Fort v. Civil Serv. Comm'n, supra; In re Davis, supra.* We conclude that RCW 9.86.020

(1) and (2) is invalid as unconstitutionally overbroad on its face.

In so concluding, we recognize that the problem here with respect to which we have both power and duty is only to determine whether the defendant had the constitutional right to do what he did. We judicially know that the exercise of the right of free speech often has emotional overtones. At one extreme such an exercise is regarded as a raw and irrational contest between government on the one hand and an irresponsible individual on the other. To others the exercise of the right of free speech is but the assertion of what the literal meaning of the First Amendment permits. The doctrines of symbolic speech and overbreadth as developed by the courts adopt neither extreme and seek to give effect both to the proper societal interest of the state and nation without rejecting the proper free speech demands of the individual. Under that doctrine, the American flag continues to be entitled to our affection and respect as described in *Halter v. Nebraska*, 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419 (1907). *Halter*, however, no more controls our decision in this case than does the latest case dealing with flag desecration which requires intent to desecrate as distinguished from flag use, which does not. *Joyce v. United States, supra; State v. Turner*, 78 W.D.2d 276, 474 P.2d 91 (1970). *Halter* was concerned with a portion of the Nebraska flag statute similar to RCW 9.86.020(3), not (1) or (2). It dealt with the validity of a statute forbidding the exploitation of the American flag in the sale of a product, namely, exploitation in the form of a representation of the American flag imprinted on a bottle of beer for purposes of advertisement. *Halter* had no occasion to discuss either the First Amendment, symbolic speech, or the doctrine of overbreadth—and did not do so. *See generally*, 16 Am. Jur. 2d,

Constitutional Law § 348 (1964). What we do here is merely to give proper weight to cases, including those referred to in this opinion, decided subsequent to *Halter* that, without departing from *Halter*, have developed the doctrine of symbolic speech in light of the doctrine of overbreadth.

In our opinion, RCW 9.86.020(1) and (2) would not violate the First Amendment if more narrowly drafted to protect a proper governmental interest as described in *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). Although we express no opinion on the text of a proposed narrower draft of a flag desecration statute such as RCW 9.86.030 as amended, not here charged to have been violated by defendant, a suggested statute setting forth what its author contends is a protectable governmental interest is contained in Note, *Flag Desecration: Illegal Conduct or Protected Expression?*, 22 Case Western Reserve L. Rev. 555, 573 (1971). *See* Note, *Less Drastic Means and the First Amendment*, 78 Yale L. J. 464 (1969).

The judgment is reversed with directions to dismiss the charge.

UTTER, J., concurs.

WILLIAMS, J. (dissenting)—The principal question in this case simply stated is: Does the interest of the citizens of the state of Washington in the preservation of the integrity of the American flag transcend the desire of appellant to publicly proclaim his political views by the use of that flag as a backdrop or billboard? I believe the essential purpose of the flag should be preserved and that our state government has properly prohibited the use which appellant would make of it.

In essence, appellant's argument is that he has a right protected by the First Amendment to employ the American

flag to express and convey his ideas and to make alterations to the flag best suited to his purposes. There is no doubt that an American flag so employed will attract attention and that a message placed thereon either in words or by symbol will be broadcast.

Freedom of speech is not beyond all control. A state interest and the general good may take precedence over the exercise of unfettered personal liberty. The test for determining whether a public interest is superior to the individual's exercise of free speech is stated in *United States v. O'Brien*, 391 U.S. 367, 377, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968) as follows:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The statute in question is well within the requirements of these criteria.

The United States Supreme Court in *Halter v. Nebraska*, 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419 (1907), decided that a state may prevent the misuse of the American flag, not only to prevent breaches of the peace generated thereby, but also because

> [i]t is not extravagant to say that to all lovers of the country it [the flag] signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong;

> security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected.

Should the law be, as contended by appellant, that each citizen under the guise of "symbolic speech," is free to mutilate or disfigure the flag to express his ideas, good or bad, then the essential purpose of the flag, which Woodrow Wilson called "the emblem of our unity, our power, our thought, and our purpose as a nation," will be destroyed. M. Krythe, What So Proudly We Hail 26 (1968). The interest of every citizen as well as that of the state of Washington in the preservation of the flag, unmarked and unsullied, overrides appellant's privilege of citizenship and his personal liberty merely to the extent that he must find some other means, of which many are available, to express his ideas. *See Joyce v. United States,* —— F.2d —— (D.C. Cir. 1971), slip opinion, October 26, 1971; *People v. Radich,* 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970), *aff'g by an equally divided court,* 400 U.S. 864, 28 L. Ed. 2d 287, 91 S. Ct. 1217 (1971).

Our Supreme Court in *State v. Oyen,* 78 W.D.2d 934, 943, 480 P.2d 766 (1971) had this to say:

In applying the concept in situations where freedom of speech may be concerned, it is essential to bear in mind that an otherwise valid statute, which, in protecting important societal interests, makes a particular course of conduct illegal, does not run afoul of the constitution merely because the right of free speech may be intermingled with the condemned conduct. *Cox v. Louisiana, supra,* [379 U.S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453 (1965)]; *United States v. O'Brien,* 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968); *Cameron v. Johnson,* 390 U.S. 611, 20 L. Ed. 2d 182, 88 S. Ct. 1335 (1968); *Adderley v. Florida,* 385 U.S. 39, 17 L. Ed. 2d 149, 87 S. Ct. 242 (1966); *Kovacs v. Cooper,* 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448 (1949).

In such situations, however, it is incumbent upon the court to weigh the purported impairment of speech engendered by the statutory provision against the importance of the societal interest sought to be vindicated by the statute, as well as the nature and extent of the threat which the statutorily forbidden conduct poses to that interest. And, too, the alternatives available to the state and the claimant must be evaluated, *i.e.,* whether the state may achieve its ends in a less restrictive manner and/or the claimant effect his communication in a way less detrimental to the societal interest.

As seen, the statute protects an important societal interest, whereas appellant has suffered a very slight impairment of his method of expression and no strictures on speaking, writing, or conveying his ideas by any other means. *Oyen* is a much more provocative case than the one presented here, because the defendants in *Oyen* were arrested for engaging in pamphleteering, one of the truly

historical methods of public dissemination of political views. The Supreme Court applying the test above set out held that even though the pamphleteering was conducted on a walkway outside of school buildings, it must yield to the interest of the state in maintaining a scholastic atmosphere for students of the school.

As to appellant's contention that the statute does not meet the constitutional test of due process because it is vague, I believe that it is sufficiently definite to inform a person with reasonable precision what acts are prohibited, so that he may have a certain, understandable rule of conduct and know what acts he must avoid. *State v. Oyen, supra.*

It is of no importance that appellant was arrested for violation of a flag misuse law rather than one for desecration containing an element of contemptuous intent because the power of the state to further the peoples' interest by protecting the flag may be exercised irrespective of evil or malice. *State v. Turner,* 78 W.D.2d 276, 474 P.2d 91 (1970). The statute with which we are concerned has for its purpose the preservation of unmarked national and state symbols. The prohibition is against all disfigurement, no matter how noble the thought behind it.

Freedom of speech does not, in my view, include freedom to publicly use the American flag in the manner employed by appellant, in the face of an acknowledged societal interest in the flag. Although it may be important to appellant to express his views in this novel way, he should remember that the United States, as symbolized by the American flag, is important too.

The judgment should be affirmed.

Opinion of the Supreme Court of Washington

[No. 42256. En Banc. Jan 18 1973]

THE STATE OF WASHINGTON, *Appellant*, v. HAROLD OMAND SPENCE, *Respondent*.

[1] Criminal Law—Defenses—Ignorance of Law. Absent insanity, all persons are presumed to know the law and are held responsible for their free and voluntary acts and deeds.

[2] Flags—Use and Display—Addition of Design—Elements of Crime—Intent. RCW 9.86.020, which prohibits the placing of any design or symbol upon the flag of the United States, or the displaying of a flag so marked, defines an offense which is malum prohibitum and which requires no proof of evil intent or motive but only a voluntary and knowing act in order to constitute a violation of the statute.

[3] Statutes—Validity—Standing to Challenge—Constitutionality. A party may not urge the unconstitutionality of a statute unless he has been adversely affected by the features of the statute about which he makes his complaint.

[4] Criminal Law—Statutes—Validity—Challenge in the Abstract. Judicial power should not be exercised in hypothetical cases to declare a legislative act unconstitutional.

[5] Criminal Law — Statutes — Certainty — Standard of Guilt. A criminal statute which leaves the standard of

guilt to the variant views of the different courts and juries which may be called upon to enforce it is unconstitutionally vague.

[6] Flags—Constitutional Law—Freedom of Speech—Symbolic Speech—Addition of Design. RCW 9.86.020, which prohibits the placing of any design or symbol upon the flag of the United States, or the displaying of a flag so marked, does constitute a limitation on speech, symbolic or otherwise, and is both precise in its terms and its breadth and is constitutional.

[7] Flags—Use and Display—Statutory Provisions—Validity. A nation has a right to adopt a national emblem and the member states have a right to adopt statutes regulating its use and protecting it from abuse and misuse.

Stafford and Hamilton, JJ., concur by separate opinion; Finley, J., dissents by separate opinion; Utter and Brachtenbach, JJ., did not participate in the disposition of this case.

Appeal from a decision of the Court of Appeals, November 15, 1971, 5 Wn. App. 752. *Reversed.*

The Court of Appeals reversed a judgment of the Superior Court for King County, No. 54474, Charles R. Denney, J. Pro Tempore, entered October 29, 1970. Respondent (prosecution) appealed to the Supreme Court.

Prosecution for improper display of the flag. Defendant appealed to the Court of Appeals from a conviction and sentence.

IN THE

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 42256

EN BANC

Filed Jan 18 1973

THE STATE OF WASHINGTON,

Appellant,

v.

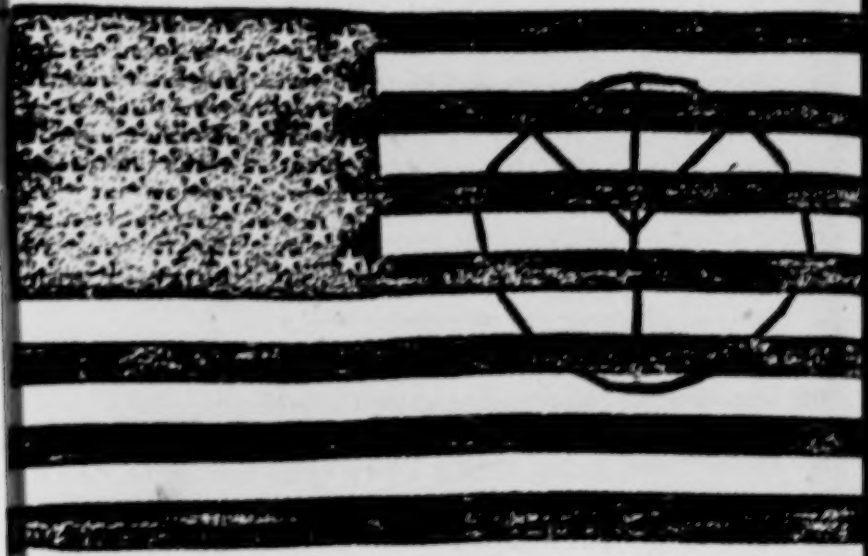
HAROLD OMAND SPENCE,

Respondent.

Defendant was charged in King County Justice Court with unlawfully displaying a flag of the United States upon which he had affixed a design or picture to both surfaces. The Justice Court, sitting without a jury, found him guilty and sentenced him to 90 days' confinement with 60 days suspended. Defendant appealed to the King County Superior Court where a jury found him guilty. On an agreed statement of facts, he appealed the judgment and sentence of 10 days' confinement, suspended, and a fine of $75, and costs entered on the verdict. The Court of Appeals reversed with one judge dissenting (5 Wn. App. 752 (1971)); the state obtained review by appeal to this court under Rule on Appeal II-2, and we reverse the Court of Appeals.

That the flag (exhibit No. 3) upon which defendant had taped a picture or diagram was an actual flag of the United States is clear, so acknowledged by both prosecution and

defense and so recognized by this court. It measures about 58 inches long and 35 inches wide. On both faces, defendant had outlined in glossy, black plastic ½-inch tape a large circular diagram about 19½ inches in diameter, inside of which was laid out in the same plastic tape another symbol resembling a trident.



The trident consisted of a 19½-inch line of plastic tape forming a vertical diameter and two 10-inch lines running from the approximate center on either side of it to intersect the circumference at a point approximately 6 inches from either side of the diameter. The whole design was set in about 4 inches from the top of the flag, 9¼ inches from the bottom, and about 6½ inches from either edge. It thus occupied nearly one-half of the entire surface of the flag. Defendant calls it a symbol of peace. He had placed the

symbol on both surfaces of the flag and suspended the flag upside down from his apartment window. According to the agreed statement of facts:

> The uncontroverted testimony of the state's witnesses, three Seattle police officers, was: they observed a flag with a masking tape peace symbol attached thereto, hanging upside down out of a window at 1006 E. Prospect Street, Seattle, Washington; they entered the main door of the apartment building and were met by the defendant who said, "I suppose you are here about the flag. I didn't know there was anything wrong with it. I will take it down"; the defendant allowed the officers to enter his apartment where the flag was located; the officers arrested the defendant and seized the flag; the defendant co-operated with the police officers.
>
> The state introduced, and the court admitted, the flag with the masking tape peace symbol. (It was identified as Exhibit No. 3). The state rested its case.
>
> The defendant, Mr. Spence, took the stand and testified on his own behalf. The defendant testified that he put a peace symbol on the flag and displayed it to public view as a protest to the invasion of Cambodia, and the killings at Kent State University, both of which had occurred a few days previously. Mr. Spence said his purpose of putting the peace symbol on the flag was to associate the American flag with peace instead of war and violence. He testified that he choose [*sic*] masking tape so that the peace symbol could be removed without damaging the flag. He said that he did not know that placing masking tape on a flag was against the law.

Defendant was not convicted of violating the flag desecration statute. RCW 9.86.030. *See State* v. *Turner*, 78 Wn. 2d 276, 474 P.2d 91 (1970). He was convicted of violating RCW 9.86.020(1) and (2), the alteration or improper use statute, which states:

> No person shall, in any manner, for exhibition or display:
>
> (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or
>
> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement;

Defendant attacks the constitutionality of RCW 9.86.020 (1) on two grounds: (1) that it violates the freedom of speech guarantees of the first amendment to the Constitution of the United States, and article 1, section 5, of the Constitution of the State of Washington, and (2) that the statute is unconstitutionally vague and overbroad when read with RCW 9.86.010, which states:

> The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purport-

ing to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

Defendant said that the diagram stood for peace. It depicted his protest against the invasion of Cambodia by American troops, and the killing of students at Kent State University when a unit of the Ohio National Guard fired upon them during a student demonstration. Both the invasion of Cambodia, an American military action undertaken by United States forces as an operation of the Vietnam war, and the shootings at Kent State had occurred shortly prior to the events of this case. Defendant said that he was unaware that taping the symbol upon and displaying the flag was against the law. He did not contend, however, that he was unaware that the cloth upon which he affixed the symbol was an actual flag of the United States of America.

As to his knowledge of the law, that point is readily determined by the long-standing and basic principles upon which our legal system depends, that all sane persons are presumed to know the law and are in law held responsible for their free and voluntary acts and deeds. 21 Am. Jur. 2d *Criminal Law* § 94 (1965).

Defendant first contends that the prosecution failed to supply evidence and the court refused to instruct that an element of the offense charged was criminal or evil intent, and that, therefore, he should have been acquitted because of the state's failure to prove an element of the crime charged. He cites, *inter alia*, *State* v. *Turner*, *supra*, a flag burning and desecration case maintained under RCW 9.86.030. That holding, in our view, does not support defendant's position, but contrarily militates against it, for

it is based upon the fundamental distinctions between conduct proscribed as malum prohibitum and conduct malum in se.

In *Turner,* the defendant was charged under RCW 9.86.030 (amended in Laws of 1969, 1st Ex. Ses., ch. 110, p. 823), with flag desecration by burning, and we held that intent to desecrate was an element that must be established by the prosecution. Under RCW 9.86.020, however, under which the complaint here is laid, evil intent or design is not an element. A violation is complete when one knowingly places any word, figure, mark, picture, design, drawing or advertisement upon the flag of the United States, or flies a flag so marked. All that is required to complete the offense is to knowingly perform the prohibited act, and it is immaterial—except for consideration of punishment—whether the act was done with an evil motive or an exalted one. The question of criminal intent or evil purpose, therefore, does not arise in this case for the charge was laid not under the flag desecration statute, which has been held to define an offense malum in se, but rather was brought under the flag alteration or improper use statute (RCW 9.86.020), defining offenses malum prohibitum, and requires no proof of evil or criminal intent or design, but only that the act was voluntarily and knowingly done. *Cf. State* v. *Turner, supra;* Desecration of the flag of the United States; penalties, 18 U.S.C. § 700 (Supp. 1972).

The object to which defendant affixed the tape symbol was an actual flag of the United States. 4 U.S.C. § 1 (1927). It conformed to the official design prescribed in 4 U.S.C. § 1 (1927), as augmented by executive orders of the President adding additional stars for additional states admitted into the Union (4 U.S.C. § 2 (1927)). It was thus a flag of the

United States within the protective provision of 4 U.S.C. §3 (1927), prohibiting the printing, painting, attaching or affixing any word, figure, mark, picture, design, drawing or advertisement upon, or displaying a flag so adorned within the District of Columbia, a statute quite similar in language to that now before us.

Defendant contends that the statute is unconstitutionally overbroad and vague, made so by RCW 9.86.010, which relates to such things as standards, colors, ensigns or shields. Although defendant might profess doubts as to what these latter devices are, there is no doubt but that the statute adequately informed him with reference to the article he used—an actual American flag. The prohibited conduct whereof defendant was charged, we think, was described in the statute and in the complaint in language sufficiently clear and concise as to be comprehended by a person of ordinary understanding.

> [A]lmost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel.

Harlan, Justice, concurring in the result in *Cole* v. *Richardson*, 397 U.S. 238, 240, 25 L. Ed. 2d 275, 90 S. Ct. 1099 (1970); *Cole* v. *Richardson*, 405 U.S. 676, 683, 31 L. Ed. 2d 593, 92 S. Ct. 1332 (1972). Defendant made no claim whatever that he did not know that the article he suspended from his apartment window was a flag of the United States. Thus, as applied to him, the charge was well laid and the statute constitutionally precise. The conduct whereof he was convicted was clearly prohibited and specifically charged.

That there are ways and means other than those charged by which the statute may be violated does not render it

vague and overbroad as to the particular conduct charged if an understanding of the conduct prohibited can be reasonably drawn from the act. In *Zicarelli* v. *New Jersey State Comm'n of Investigation,* —— U.S. ——, 32 L. Ed. 2d 234, 238, 92 S. Ct. 1670, 1674 (1972), defendant argued that the "immunity provided by the New Jersey statute is unconstitutionally vague because it immunizes a witness only against the use and derivative use of 'responsive' answers and evidence."

In holding untenable the contention of vagueness, the court, *inter alia,* said:

> This is not the technical construction of "responsive" in the legal evidentiary sense that appellant fears, but rather is a construction cast in terms of ordinary English usage and the good-faith understanding of the average man. The term "responsive" in ordinary English usage has a well-recognized meaning. It is not, as appellant argues, "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926).

Defendant is in no position to conjure up hypothetical behavior which, while colorably actionable, would render the statute vague or overbroad when the particular conduct charged is clearly within the statute. One may not urge the unconstitutionality of a statute unless he has been adversely affected by the features of it which he claims are unconstitutional. *State* v. *Lundquist,* 60 Wn.2d 397, 374 P.2d 246 (1962); *State* v. *Human Relations Research Foundation,* 64 Wn.2d 262, 391 P.2d 513 (1964).

The judicial power to declare a legislative act unconstitutional should not be exercised in hypothetical cases. *United*

States v. *Raines*, 362 U.S. 17, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960); *State* v. *Dixon*, 78 Wn.2d 796, 479 P.2d 931 (1971). This principle, we think, finds new support in *Grayned* v. *City of Rockford*, —— U.S. ——, 33 L. Ed. 2d 222, 92 S. Ct. 2294, 2298 (1972), which considered an antinoise ordinance from two separate standpoints, (a) vagueness, and (b) overbreadth. That opinion held neither vague nor overbroad an ordinance which said that no person, while on or adjacent to any school grounds or building, "shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof."

A criminal statute is unconstitutionally vague when it leaves the standard of guilt to the variant views of the different courts and juries which may be called upon to enforce it. *Grayned* v. *City of Rockford, supra.* Thus, a statute making it a criminal offense to exact any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries was held unconstitutionally vague because one charged under it would not be informed of the nature and cause of the accusation (*United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 65 L. Ed. 516, 41 S. Ct. 298 (1921)); but a statute prohibiting the sale of goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor, including as it did the element of predatory intent, was held good. *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963). It is thus the rule that, if the general class of offenses to which a penal statute is directed falls plainly within its terms and can be made constitutionally definite by a reasonable construction, the statute will not be held unconstitutionally vague even though marginal cases could be conjured up where doubts of constitution-

ality would arise. *United States* v. *Spector,* 343 U.S. 169, 96 L. Ed 863, 72 S. Ct. 591 (1952). Where possible, it is the duty of the courts to give to a statute the construction which sustains its constitutionality, even though it might be susceptible of a different interpretation. *United States* v. *Rumely,* 345 U.S. 41, 97 L. Ed. 770, 73 S. Ct. 543 (1953); *State* v. *Dixon, supra,* and cases cited therein. Similarly, an oath required of all Massachusetts public employees not only to uphold and defend the constitutions, but to oppose the overthrow by force, violence, or any illegal or unconstitutional method, was held neither unconstitutionally vague, nor otherwise invalid despite the contention that the word *oppose* could conceivably be construed to demand active combat against those who would overthrow the government by force, violence, or other unconstitutional means. *Cole* v. *Richardson,* 405 U.S. 676, 31 L. Ed. 2d 593, 92 S. Ct. 1332 (1972).

Defendant also contends that the flag statute under which he was convicted is unconstitutional for overbreadth because it impairs his freedom of speech as guaranteed under the First Amendment. Placing the device on the flag, he says, was symbolic speech. When a statute impairs the right of freedom of speech prima facie, he urges, there is no presumption of its constitutionality, and the state has a heavy burden of sustaining it.

We are unable to sustain such sweeping condemnations of what appears to be a straightforward and precisely declared prohibition of placing either words, figures, marks, designs, drawings or advertisements upon a flag of the United States, or displaying such flag after this has been done to it.[1]

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[1] We think it inappropriate and fruitless to initiate an analysis of those recent cases which relate to freedom of speech, "fighting

The assertion made here of symbolic speech as a basis for sustaining the claim of unconstitutional vagueness and overbreadth is, we think, as nebulous, vague and overbroad as the statute here applied is narrow and precise. The statute does not purport to inhibit speech of any kind whether actual or symbolic, printed or auditory; it merely says that one cannot use the flag of the United States as the material upon which to print his utterance; he cannot lawfully employ the flag as a billboard, poster, or placard upon which to print his message.

Case authority upon which defendant relies, to sustain his claim of freedom of symbolic speech exercised by attaching signs or symbols upon an actual flag, are inapplicable. *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943), went no farther than to hold that neither children nor their parents could be punished for refusing to salute the flag if they had bona fide religious convictions against doing so. *Stromberg* v. *California,* 283 U.S. 359, 75 L. Ed. 1117, 51 S. Ct. 532 (1931), referred to by defendant, merely held that the state could not constitutionally prohibit the display of a red flag as a

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words," and public obscenity as inaugurated in *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942); *Terminiello* v. *Chicago,* 337 U.S. 1, 93 L. Ed. 1131, 69 S. Ct. 894 (1949); *Feiner* v. *New York,* 340 U.S. 315, 95 L. Ed. 295, 71 S. Ct. 303 (1951); *Cox* v. *Louisiana,* 379 U.S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453 (1965), culminating in *Cohen* v. *California,* 403 U.S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971), in which a jacket proclaiming an obvious obscenity against enforcement of the draft laws, was conspicuously worn by the accused while walking through the Los Angeles County Courthouse; the wearing was held protected by the First Amendment despite oft-repeated judicial assertions that public obscenity is not so protected, and since the words did not appear to be directed toward any person but to the conscription laws in general, they could not be held to be "fighting words."

sign of opposition to the government. It did not involve a flag of the United States, nor any defacement of it. *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969), held that students could not be precluded from wearing black arm bands as a symbol of protest against the American participation in the Vietnam war. *Street* v. *New York,* 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969), involved a charge of *desecration* of the flag by words directed against it and the burning of it. It reversed the conviction, as we understand, for the reason that the court could not ascertain from the record whether defendant had been convicted for what he *said* about the flag, or what he *did* to it. There was, moreover, no circumstance there in which it could be said that Street was using so-called "fighting words," or inciting a public disturbance, violence, or riot, or was engaged in conduct which at that time and place would be likely to do so. And finally, *Long Island Vietnam Moratorium Comm.* v. *Cahn,* 437 F.2d 344 (2d Cir. 1970), cited by defendant, does not concern an actual flag of the United States, but merely a red, white and blue circular design with the asserted peace symbol superimposed upon it.

The issue in this case, then, is not whether the legislature in enacting RCW 9.86.020 has intended to or actually curtailed or impaired the rights of this defendant to speak freely or to communicate his ideas to others, for there is nothing about the statute which would do this. As applied to him, the statute does not bar the defendant from buying, printing, marking, proclaiming, denouncing, carrying, advocating, or displaying upon any kind of material or object he chooses whatever idea he wishes to communicate to

others except upon a flag of the United States. Nor does the state contend that he can be required to pay public obeisance to the flag, or compel him to pledge allegiance to it. *See State ex rel. Bolling* v. *Superior Court,* 16 Wn.2d 373, 133 P.2d 803 (1943), holding that children whose parents were members of Jehovah's Witnesses could not be compelled to pledge allegiance in the public schools. The only interdiction of free speech so far as this case is concerned is that one cannot alter or deface a flag of the United States —and perhaps other official symbols which are not before us—as a medium of communication. The larger issue, therefore, is whether a state—or the United States—can constitutionally bar the public employment and display of a flag of the United States, the official emblem of the nation, as a backing or as background material, or as a billboard poster or placard for advertising a cause, philosophy, religion or product. We note that the statute does not bar the carrying of the American flag in connection with other banners, flags, signs, symbols or devices, but only the altering or adorning of it, or a symbol representing it, by placing foreign and extraneous materials, marks or symbols upon it. Thus, whatever impairment might be said to arise from this statute trenching upon the defendant's rights to speak his mind freely and communicate his personal views by sign and symbol is minimal—so minuscule and trifling as to come within the de minimis non curat lex rule. Defendant's freedom of speech and communication is no more impaired by this statute than would his rights to symbolic speech be abridged by an antinoise ordinance prohibiting the use of sound tracks at certain places and hours or the needless sounding of automobile horns and bells—or unnecessary noise next to a school. *Grayned* v. *City of Rockford,* —— U.S. ——, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).

The nation has a right to adopt a national emblem and the states have a right to protect it. The nation and the state have a constitutional right to declare that the flag of the United States, as a national symbol, is not available to anyone for use as a backing nor may it be altered for purposes of creating a medium for self-advertising, whether that advertising be the dissemination of one's private views on life and things in general, or of a commercial product or service. We think it beyond argument that the nation and state both have a recognizable interest in preserving the flag as a symbol of the nation and in keeping it free of extraneous adornment and alien markings and designs.

The rule contended for by defendant, that his claimed right to affix a conspicuous symbol upon the flag of the United States is an integral component of his freedom of speech, has grave portent. If this defendant had this right, if the state cannot keep the flag of the United States free of extraneous signs, markings, pictures, designs, drawings and advertisements, then, of course, that right to put them there belongs equally to everyone. Banks and finance companies could, with equal claim of right, proclaim their solvency or the insolvency of business rivals with the dollar sign overprinting the flag; cattlemen with pictures of prize animals; or canneries with facsimiles of canned goods. If defendant's view of the constitution were sound, then nearly everything offered, sold, hawked or delivered could lawfully in one way or another be advertised upon the flag of the United States, and the several states and the United States would be without power to prevent it.

And that is not the end of it: There is the realm of political, social, religious and philosophical ideas. If defendant cannot be constitutionally barred by law from affixing and displaying what he describes as a peace symbol

upon the flag of the United States, neither can he be constitutionally prevented from proclaiming the Ku-Klux Klan upon it, nor the swastika, nor the hammer and sickle, either in advocacy of the Ku-Klux Klan, or Nazism, or Communism, or in opposition to these movements. Nor could he be stopped from utilizing the flag as a medium of display for whatever religious signs or symbols of whatever religion, new or old, he might espouse or detest. In short, if the defendant were right, the state and the United States could not lawfully prevent the flag from being actually employed as a billboard, placard, or backing for advertising proclaiming anything and everything imaginable.

We think the state can constitutionally keep the flag free of extraneous symbols, pictures and signs. There are thousands of other means available to the defendant for the dissemination of his personal views, and depriving him of the flag of the United States as one of them does not in our opinion measurably impair his freedom of speech.

The constitutionality of a similar flag statute, as it applied to the picture of a flag printed on a bottle of beer, was questioned in *Halter* v. *Nebraska,* 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419 (1907). There the statute prohibited the placing of or the exhibition or display of any flag of the United States upon which had been placed any word, figure, mark, picture, design, drawing or advertisement and punished violations as a misdemeanor. In sustaining the constitutionality of the Nebraska flag statute, the court said:

> And we cannot hold that any privilege of American citizenship or that any right of personal liberty is violated by a state enactment forbidding the flag to be used as an advertisement on a bottle of beer. It is familiar law that even the privileges of citizenship

> and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good.

and, further,

> It would be going very far to say that the statute in question had no reasonable connection with the common good and was not promotive of the peace, order and well-being of the people. Before this court can hold the statute void it must say that and, in addition, adjudge that it violates rights secured by the Constitution of the United States. We cannot so say and cannot so adjudge.

Accordingly, the Court of Appeals is reversed and the cause remanded to the King County Superior Court for reinstatement of the judgment and sentence.

HALE, *C.J.*

WE CONCUR:

ROSELLINI, *J.*
HUNTER, *J.*

WRIGHT, *J.*
COCHRAN, *J. Pro Tem*

No. 42256

STAFFORD, J. (Concurring in the Result Only)—I concur in the result reached by the majority. I cannot, however, agree with the manner in which the majority has dealt with the problem of overbreadth in the area of the first amendment to the United States Constitution. The cases cited in support of the majority's position are not, for the most part, first amendment cases. Using non-first amendment cases to support a first amendment issue undermines the majority rationale. For this reason I concur in the result only.

STAFFORD, J.

I concur, HAMILTON, J.

No. 42256

FINLEY, J. (dissenting)—On May 10, 1970, thousands of young Americans felt moved to protest the U.S. invasion of Cambodia and the killings at Kent State University which had occurred a few days previously. The young man before this court joined in this expression of dissatisfaction by displaying an American flag (his own personal property) from a window of his apartment. The flag was displayed in an upside down position. A reasonable facsimile of the symbol of peace, currently well-recognized as such by most young people and also by many older people, had been superimposed on the flag by the use of adhesive black elec-

trical tape. This same peace symbol is worn as a medallion: It is embroidered or otherwise made a part of various parts of the wearing apparel of many young people, ranging from college down to high school and grammar grades. *This, as I view the circumstances, is the factual picture which emerges from this case. It is obviously significantly different from what arises from the majority's interpretation and extrapolation of the evidence.* It seems to me that this is, in essence, a case of a perhaps over-exuberant youthful advocate for peace and for ending the war in Vietnam.

His was an advocacy with which most people now rather wholeheartedly and well nigh unanimously agree. The President of the United States and his recent political opponent for the Presidency apparently agreed upon this, if nothing else. Even a majority of Congress—despite political party affiliations—I daresay are in substantial agreement. The only area of disagreement is in terms of the time and manner of ending the war and restoring peace in our time. The young man's action in displaying the flag adorned with the peace symbol in the manner indicated above might be regarded as an example of an idealistic and courageous appeal for world peace. However, he has apparently offended the sensitivities of certain more sedate citizens. In any event, *that any pernicious or baleful thing was contemplated or any evil intent actually involved is not substantiated by the evidence in this case.* And here, in essence, hangs the tale of my very respectful but nevertheless firm and substantial disagreement with the majority in this case. In other words, (a) there is, in ancient criminal law parlance, no proof of *mens rea; i.e.,* evil intent, and (b) proof of intent is, in my judgment, an essential element of the crime provided by RCW 9.86.020. Thus, as this court held in the opinion written by Hale, J., in *State*

v. *Turner*, 78 Wn.2d 276, 474 P.2d 91 (1970), the prosecution failed to prove a necessary element of the crime charged and the case simply should be dismissed on this basic and traditional ground.

It should be rather obvious that the majority's much sterner view, in construing and applying the facts of this case, leads not only to an oversimplified application of legal principles and rules, but to a grossly erroneous result. One consequence of the majority's approach, in addition to the failure to recognize the requirement that evil intent be proved, is that any objective consideration of First Amendment freedom of speech rights and concepts is brusquely swept aside, apparently simply to sustain conviction of the hapless young defendant. Contrariwise, the majority opinion of the Court of Appeals, in my best judgment, objectively construes the facts of this case, and reaches a better-reasoned, more rational disposition of this matter. In this connection, I intend to emphasize certain important considerations dealt with at considerable length in the majority opinion of the Court of Appeals by Horowitz, J., and to more fully discuss the requirement of the pertinent statute that evil intent must be proved.

The Court of Appeals objectively observed that a flag may be considered from two points of view: "(1) as a physical object, and (2) as a symbol of ideas." *State* v. *Spence*, 5 Wn. App. 752, 756, 490 P.2d 1321 (1971). In short, the view quite generally held is that "the American flag is an identifying, history-preserving and ideological symbol." 5 Wn. App. at 757. Indeed, the majority opinion itself contains more than one reference to the United States flag as a "symbol".

A symbol by its very being is expressive; so to display the American flag, if not pure expression or articulation,

is certainly a traditionally recognized and effective form of communication. *See* Note, 30 Maryland L. Rev. 332, 346 (1970). This conclusion is borne out by the determination of the U.S. Supreme Court in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 632, 87 L.Ed. 1628, 63 S.Ct. 1178 (1943) that "[s]ymbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." Indeed, the well-recognized symbol of peace, which was here attached to the American flag, is equally a form of expression when displayed. The symbolic speech which is expressed by the display of such symbols is protected by the First Amendment to the United States Constitution. *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92, 33 L.Ed.2d 212, 92 S.Ct. 2286 (1972) (picket signs); *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969) (black armbands); *Stromberg* v. *California,* 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532 (1931) (display of a red flag). *See* Note, 69 Colum. L. Rev. 1091 (1968). Consequently, one of the significant issues clearly before this court is whether the immediate statutory prohibition against affixing any design upon the flag is to take precedence over the defendant's invocation of the First Amendment protection of symbolic speech. *The majority either myopically or arbitrarily brush this issue under the rug.* The Court of Appeals did not duck the issue, but, in my judgment, evaluated it properly and determined that "a statute may protect the flag *if so to do protects the safety of the state against a clear and present danger.*" (Italics mine.) *State* v. *Spence, supra* at 759. In other words, the Court of Appeals held that no "clear

and present danger" existed to support the statute and its application in the instant case. 5 Wn. App. at 759. *See Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572, 86 L.Ed. 1031, 62 S.Ct. 766 (1942); *Schenck* v. *United States,* 249 U.S. 47, 63 L.Ed. 470, 39 S.Ct. 247 (1919); *State ex rel. Holcomb* v. *Armstrong,* 39 Wn.2d 860, 239 P.2d 545 (1952). In this regard, the Court of Appeals also determined that, where the demands of free speech seem to conflict with a protection of legitimate governmental interests, *such competing interests must be evaluated and balanced against each other* in order to determine whether the speech sought to be exercised will be constitutionally protected. *See United States* v. *O'Brien,* 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968). But, in this regard, the majority herein rather too simplistically and also arbitrarily state that they think it is "beyond argument" that the nation and state have a "recognizable interest" in keeping the flag free of "extraneous adornment". *This is not the law as is clearly shown by the cases cited above, and certainly does not address the issue before us.* The mistaken and perhaps somewhat result-oriented conclusions of the majority seem to me to fall far short of appropriate judicial treatment and resolution of the indicated very real constitutional question presented by this case. Furthermore, by adopting this incomplete approach to the serious question regarding the extent of the competing interest in protecting freedom of speech, the majority actually completely ignores the requirement established by the U.S. Supreme Court that these conflicting interests be resolved by a *careful balancing* procedure. As stated by the Court in *Thomas* v. *Collins,* 323 U.S. 516, 529-30, 531-32, 89 L.Ed. 430, 65 S.Ct. 315 (1945), substantial weight must be given First Amendment freedoms in applying this required balancing test:

> The case confronts us again *with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins.* Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment.
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> . . . [I]n our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. *Schneider* v. *State,* 308 U.S. 147, 161. And the answer, under that tradition, can be affirmative, to support an intrusion upon this domain, *only if grave and impending public danger requires this.* (Italics mine.)

As to what constitutes legitimate means of securing governmental interests in competition with the First Amendment freedoms, the U.S. Supreme Court has recently stated:

> The nature of a place, "the pattern of its normal activities, dictates the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, *Brown* v. *Louisiana,* 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our

cases make clear that *in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; . . .* (Italics mine.)

Grayned v. *City of Rockford,* 408 U.S. 104, 116, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972). In applying the balancing test required, it is my judgment that the Court of Appeals correctly determined that the passive means of communication utilized by the defendant in this case, under the particular circumstances involved, certainly constituted no "clear and present" or "grave and impending danger", and, on balance, outweighed the interest of the state—no matter how "recognizable"—in keeping the flag free of "extraneous adornment". As in *Police Department of the City of Chicago* v. *Mosley, supra,* the defendant's silent vigil was a peaceful means of communication, not prone to violence, and therefore is protected by the First Amendment. Additionally, as noted by the Court of Appeals, where the U.S. Supreme Court has held that words critical or contemptuous of the flag are protected by the First Amendment, certainly the attachment of a symbol to the flag—an innocuous act containing no disrespect for the flag—constitutes a protected form of speech, and is to be accorded greater weight than the competing interest of the state in this matter. *See Street* v. *New York,* 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969).

The majority states as its reason for ruling that the defendant's means of expression should not receive the protection of the First Amendment that "whatever impairment might be said to arise from this statute trenching upon the defendant's rights to speak his mind freely and communicate his personal views by sign and symbol is minimal;" that "there are thousands of other means available to the

defendant for the dissemination of his personal views." It is historically undeniable that this type of reactionary, if not personally biased reasoning was the very sort that has led to and perpetuated unconstitutional deprivations of fundamental liberties in the past. In *Plessy* v. *Ferguson*, 163 U.S. 537, 41 L.Ed. 256, 16 S.Ct. 1138 (1896), the U.S. Supreme Court noted that the statute being contested there provided for equal accommodations for blacks and whites in railway coaches, and ruled essentially that, since blacks had other adequate seats on the train, no need existed to allow them to occupy seats reserved for whites. This "other means available" logic of the "separate but equal" doctrine began to crumble in *Sweatt* v. *Painter*, 339 U.S. 629, 94 L.Ed. 1114, 70 S.Ct. 848 (1950), and was finally held by the Supreme Court to afford an unconstitutional treatment of blacks in *Brown* v. *Board of Education*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954). In ruling as it did, the Court explicitly rejected the reasoning which the majority in this case advances in support of its conclusion. The fact that there may well be "other means available" is certainly no basis for depriving one of fundamental liberties, whether such freedom takes the form of choosing to sit in any seat in a train, or expressing personal views through the combined display of chosen symbols. In view of the United States Constitution's powerful protection of the freedom to speak one's mind, and almost innumerable decisions of the United States Supreme Court to this effect, it seems not only highly irregular and unnecessary but arbitrary and oppressive for the majority to hold otherwise in this case. I am therefore in agreement with the holding of the Court of Appeals that RCW 9.86.020, the improper display statute, as interpreted by the majority and applied

in this case constitutes an unconstitutional abridgment of free speech.

The majority, as indicated above, also suggests that proof of evil intent is not required in a prosecution under the immediate statute (RCW 9.86.020). I cannot agree. Although the conviction of the defendant should be reversed upon the basis that the statute violates the defendant's constitutionally-protected freedom of speech, I am firmly convinced that the trial court erred in refusing to instruct the jury that evil intent is an essential element of the offense charged. If proof of evil intent were not required, then the Court of Appeals correctly concluded that the patriotic editions of two Seattle newspapers (Seattle Post-Intelligencer, July 4, 1970 at page 1, and Seattle Times, June 14, 1970 § A, at page 1), in displaying a picture of the American flag with words and pictures over it, would be equally susceptible to criminal charges, since RCW 9.86.020 applies both to an actual flag and to a representation of the flag. RCW 9.86.010. Certainly I cannot distinguish, and I submit the majority herein cannot distinguish the defendant's actions from the pictures in the two publications simply because the patriotic message or communication of the newspapers seems to be a more preferable instance of the exercise of freedom of speech:

> But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Cohen* v. *California,* 403 U.S. 15, 24 (1971); *Street* v. *New York,* 394 U.S. 576 (1969); *New York Times* v. *Sullivan,* 376 U.S. 254, 269-270 (1964), and cases cited: *NAACP* v. *Button,* 371 U.S. 415, 445

(1963); *Wood* v. *Georgia*, 370 U.S. 375, 388-389 (1962); *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949); *DeJonge* v. *Oregon*, 299 U.S. 353, 365 (1937).

Police Department of the City of Chicago v. *Mosley*, *supra* at 95. Indeed, such a distinction need not be made. Neither the publications of the newspapers nor the conduct of the defendant herein appear to have contained the element of evil intent which is necessarily required under RCW 9.86.020. We stated in *State* v. *Turner*, *supra* at 282, in determining whether the flag desecration statute (RCW 9.86.030) required proof of intent for conviction, that if such proof of evil design or purpose were not necessary, "the legislature could readily have said otherwise." It is therefore significant here that the legislature has also been silent regarding the element of intent in the crime of improper display of the flag (RCW 9.86.020). Certainly proof of evil intent must be necessary here as well. This conclusion is further supported by the very pertinent, applicable, and decisively phrased language of Justice Hale in setting forth the holding of the court in *State* v. *Turner*, *supra* at 283:

> Accordingly, unless the statute expressly eliminates the element of intent or design or defines the kinds of offenses which, by their very nature, are classified judicially as mala prohibita, the ingredients of intent, design and purpose *should be deemed indispensable* to a proof of guilt. (Italics mine.)

Actually, the reasoning of the court and the decision in *Turner* are absolutely inconsistent with the reasoning and result reached by the majority in the instant case. Furthermore, try as I may, I can find no reasonably convincing

justification for the inconsistency. In the instant case, the jury should have been instructed and should have considered and decided whether evil intent was present in the alleged violation of RCW 9.86.020, *i.e.*, whether the defendant intended, for example, to provoke a public disturbance, disorder, breach of the peace, or a riot. The task for the jury in determining the subjective intent of the defendant, is facilitated by such objective manifestations as the character of the design upon the flag, the manner of display, the circumstances of time and place, and the activities which accompanied such display. Unless the element of evil intent be proved *beyond a reasonable doubt,* no conviction under RCW 9.86.020 can be sustained.

Finally, in rejecting the defendant's overbreadth argument, the majority has confused and misapplied the distinct constitutional doctrines of "vagueness" and "overbreadth". This distinction was most recently recognized by this court in *State* v. *Oven,* 78 Wn.2d 909, 480 P.2d 766 (1971). "Vagueness" is found where the legislation fails to provide fair notice to the public of that which is being prohibited by the law. *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 31 L.Ed.2d 110, 92 S.Ct. 839 (1972); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967); *Edwards* v. *South Carolina,* 372 U.S. 229, 9 L.Ed. 2d 697, 83 S.Ct. 680 (1962); *Seattle* v. *Drew,* 70 Wn.2d 405, 423 P.2d 522 (1967). It is an element of due process which demands precision in penal legislation. *NAACP* v. *Button,* 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963). On the other hand, the "overbreadth" doctrine applies where the penal legislation prohibits not only unprotected behavior, but embraces within its scope some constitutionally protected activity, even though the language of the statute may

be sufficiently precise as not to be deemed "vague". *United States* v. *Robel,* 389 U.S. 258, 19 L.Ed.2d 508, 88 S.Ct. 419 (1967); *Freedman* v. *Maryland,* 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965); *Aptheker* v. *Secretary of State,* 378 U.S. 500, 12 L.Ed.2d 992, 84 S.Ct. 1659 (1964); *Shelton* v. *Tucker,* 364 U.S. 479, 5 L.Ed.2d 231, 81 S.Ct. 247 (1960); *Adams* v. *Hinkle,* 51 Wn.2d 763, 322 P.2d 844 (1958). In some cases the legislation may suffer from both infirmities by containing imprecise language (vagueness) and by prohibiting a constitutionally protected activity (overbreadth). *See Cox* v. *Louisiana,* 379 U.S. 536, 13 L.Ed.2d 471, 85 S.Ct. 453 (1964); *Winters* v. *New York,* 333 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665 (1948); *Seattle* v. *Drew, supra.*

Because of the majority's confusion of these two doctrines, it repeatedly rejects the defendant's overbreadth argument by asserting that RCW 9.86.020 is sufficiently precise (and therefore not *vague*) as applied to the defendant. In ruling upon this basis that the defendant may not raise the overbreadth issue in this case, the majority opinion states:

> Defendant is in no position to conjure up hypothetical behavior which, while colorably actionable, would render the statute vague or overbroad when the particular conduct charged is clearly within the statute. One may not urge the unconstitutionality of a statute unless he has been adversely affected by the features of it which he claims are unconstitutional.

In support of this pronouncement the majority cites authority which involved *neither the overbreadth doctrine nor the First Amendment, but rather which dealt with problems of "standing" under circumstances which are irrelevant*

to the immediate issue. In addition, the above statement of the majority, made in the context of a First Amendment case in which overbreadth of a statute is asserted, simply and directly contradicts the settled law of the land. In *NAACP* v. *Button, supra* at 432-33, the U.S. Supreme Court ruled as follows:

> [I]n appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill* v. *Alabama,* 310 U.S. 88, 97-98; *Winters* v. *New York, supra,* at 518-520. Cf. *Staub* v. *City of Baxley,* 355 U.S. 313. . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchallenged delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. *Marcus* v. *Search Warrant,* 367 U.S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.

Accord: Aptheker v. *Secretary of State, supra.* It is our duty, therefore, to consider that which *may* be proscribed by the statute, not simply the application of the statute to the facts of the case before us. The majority's use of non-First Amendment *vagueness* cases to rebut the defendant's First Amendment *overbreadth* challenge is both in error and improper. The "chilling effect" upon the exercise of protected freedoms of expression is the evil which the

overbreadth doctrine strives to eradicate. *Dombrowski* v. *Pfister*, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965). The proper application of the doctrine in the case before us would provide a review of the statute under all possible circumstances, thereby insuring that the exercise of protected rights will not be deterred for either the defendant or the remainder of the public.

In this same area of overbreadth, the majority also rejects the defendant's challenge on the basis that "it is the duty of the courts to give to a statute the construction which sustains its constitutionality." *The error of this conclusion is evident from our own past decisions.* In *Adams* v. *Hinkle, supra* at 769, we held that "there is no presumption of constitutionality of statutes abridging those rights [of freedom of speech or press]." *Accord: Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 96 L.Ed. 1098, 72 S.Ct. 777 (1952). Thus the majority has again cited inappropriate authority for an erroneous conclusion with the unfortunate result that the challenge of the defendant has indeed fallen upon deaf ears.

Since the rulings of both the United States and Washington Supreme Courts require that we examine the merits of the immediate challenge of this statute's overbreadth, and that we do so without affording the statute any presumption of constitutionality, it is evident that the majority's sweeping and mistaken generalities have produced a curious anomaly in the constitutional law of this state. The fact that an "actual flag" was used in the instant case seems quite irrelevant since RCW 9.86.020 does not restrict its prohibition against affixing designs to an "actual flag". Indeed, the term "flag", as used in the immediate penal statute, is defined in RCW 9.86.010 as follows:

> The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, *or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag,* standard, color, ensign or shield of the United States or of this state, *or a copy, picture or representation thereof.* (Italics mine.)

With this statutory definition in mind, the issue is whether the state has a compelling and overriding interest in prohibiting the public from affixing a design to a "picture or representation" of the flag, "made of any substance . . . evidently purporting to be . . . a copy, picture or representation" of the flag. Not only does RCW 9.86.020 require punishment for the two newspaper publications referred to earlier, it would equally demand punishment for a grammar school child's drawing of the flag which contained any patriotic slogan or other extraneous marking thereon. Thus, regardless of any personal feelings concerning the activities of the defendant before this court, it is evident that this statute goes too far. Its "chilling effect" is far-reaching. In proscribing innocent activities, the statute is overbroad, and in this respect is constitutionally inappropriate. Under these circumstances, I can find no solace in inapplicable case authority for the majority's proposition that this court may excuse one form of statutorily-prohibited conduct in *State* v. *Turner, supra,* and cavalierly condemn another as in the instant case. Since RCW 9.86.020 proscribes constitutionally protected conduct as to which no compelling state interest has been demonstrated, the

statute is overbroad on its face and therefore unconstitutional.

For the reasons stated, I would affirm the decision of the Court of Appeals to reverse the conviction of the defendant in this case.

FINLEY, J.

Order Denying Petition for Rehearing

IN THE

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Appellant,

vs.

HAROLD OMAND SPENCE,

Respondent.

The Court having considered the respondent's petition for rehearing herein,

It is ordered that the petition be and it is hereby denied.

Dated this 13th day of March, 1973.

By the Court:

Chief Justice

81 Wn.2d 788

Notice of Appeal Filed With the Supreme Court of Washington

IN THE

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 42256

HAROLD OMAND SPENCE,

Appellant,

vs.

THE STATE OF WASHINGTON,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Harold Omand Spence appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Washington reversing the decision of the Court of Appeals and remanding the cause to the King County Superior Court for reinstatement of the judgment and sentence. The decision of the Supreme Court of the State of Washington was filed on January 18, 1973 and a petition for rehearing was denied in an order entered on March 13, 1973.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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I, CHRISTOPHER T. BAYLEY, Prosecuting Attorney for King County, Washington, hereby acknowledge receipt of a copy of the foregoing notice of appeal to the Supreme Court of the United States this 9th day of April, 1973.

CHRISTOPHER T. BAYLEY

Supreme Court of the United States

No. 72-1690

Harold Omand Spence,

Appellant,

v.

Washington

APPEAL from the Supreme Court of the State of Washington.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 9, 1973

FILED
JUN 11 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1690

HAROLD OMAND SPENCE,

Appellant,

—v.—

THE STATE OF WASHINGTON,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

HAROLD OMAND SPENCE,

Appellant,

—v.—

THE STATE OF WASHINGTON,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

The Appellant, Harold Omand Spence, appeals from a decision of the Supreme Court of Washington, reversing a decision of the Court of Appeals and remanding the cause to the King County Superior Court for reinstatement of judgment and sentence. The decision of the Supreme Court of Washington was filed on January 18, 1973, and a petition for rehearing was denied on March 13, 1973. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

Opinions Below

The opinions of the Supreme Court of Washington are reported at 81 Wn.2d 788, 506 P.2d 293 (1973), and are set forth in the Appendix, *infra,* at pp. 25a-58a. The opin-

ions of the Court of Appeals are reported at 5 Wn. App. 752, 490 P.2d 1321 (1971), and are set forth in the Appendix, *infra*, at pp. 1a-24a.

Jurisdiction

The decision and judgment of the Supreme Court of Washington was filed on January 18, 1973. Appellant's petition for rehearing was denied on March 13, 1973, and his notice of appeal was filed in the Supreme Court of Washington on April 10, 1973 (App., *infra*, p. 60a). The jurisdiction of this Court to review the decision by appeal is conferred by 28 U.S.C. §1257(2) and is sustained by the following decisions: *Cohen* v. *California*, 403 U.S. 15 (1971); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921).

Statutes Involved

Revised Code of Washington §9.86.010 (1919):

> *"Flag," etc., defined.* The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

Revised Code of Washington §9.86.020 (1919):

> *Improper use of flag prohibited.* No person shall, in any manner, for exhibition or display:

(1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or

(2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement; . . .

Questions Presented

1. Whether the State of Washington, consistent with the First and Fourteenth Amendments to the Constitution of the United States, may punish Appellant for violation of a criminal statute, which prohibits improper use of the flag, for displaying an American flag with a peace symbol on it under the circumstances of this case.

2. Whether Revised Code of Washington §9.86.020 is impermissibly overbroad or vague in violation of the First and Fourteenth Amendments to the Constitution of the United States.

Statement of the Case

On May 10, 1970 the Appellant, Harold Omand Spence, displayed an American flag, upon which was superimposed a "peace symbol" constructed of removable tape, outside the window of his apartment in Seattle, Washington (App., *infra*, p. 6a). The display was observed by three Seattle

police officers who arrested the Appellant and seized the flag.

The Appellant was subsequently charged with improper use of the flag under Revised Code of Washington §9.86.020 (2) in a criminal complaint alleging as follows:

> He, the said Harold O. Spence, in the county of King, state of Washington, on or about the 10th day of May, 1970, willfully, unlawfully and knowingly for exhibition and display, did expose to public view a flag of the United States upon which there was then and there attached and affixed a mark, picture design or drawing, to-wit: a large black circle with connecting straight lines within (St. 9).[1]

The case was tried to a jury in the King County Superior Court.[2] The three arresting officers testified that they had observed the flag displayed from the Appellant's window with what they identified as a peace symbol on it. They entered the apartment building and were met by the Appellant who, referring to the flag, volunteered, "I didn't know there was anything wrong with it. I will take it down" (St. 2).

The Appellant testified that he had displayed the flag with a peace symbol on it, and had done so for the purpose of associating the American flag with peace in protest of the recent invasion of Cambodia and of the deaths at Kent State University. He explained that he had chosen masking

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[1] "St." referencess are to the Agreed Statement of Facts which comprised the record on appeal below.

[2] The case was appealed to the Superior Court from a conviction in the Seattle District Court. The latter is not a court of record and the trial in Superior Court was a trial *de novo*.

tape so that the peace symbol could be removed without damage to the flag (St. 2, 3).

The Appellant was found guilty and given a suspended sentence of ten days in jail and a fine of seventy-five dollars plus court costs (St. 3).

The federal constitutional claims presented by this appeal were raised in the trial court by motions to dismiss prior to the impanelling of the jury (St. 2), after the state rested and at the close of the defendant's case (Appellant's Opening Brief in the Court of Appeals, 5), by taking exception to the trial court's second and third instructions and by several proposed instructions which were not given (St. 3), and by a motion for a new trial (St. 3). They were considered on appeal by the Court of Appeals and the Washington Supreme Court.

The Court of Appeals reversed the conviction in a 2-1 decision which held the statute under which the Appellant was charged unconstitutionally overbroad (App., *infra*, pp. 18a-19a).

The Washington Supreme Court in turn reversed the decision of the Court of Appeals in a 6-1 decision. In characterizing the First Amendment issue before them, Justice Hale, writing for himself and three others, observed:

> The only interdiction of free speech so far as this case is concerned is that one cannot alter or deface a flag of the United States . . . as a medium of communication. 81 Wn.2d at 798-99 (App., *infra*, p. 39a).

With respect to the Appellant's interest in the speech activity at issue, the majority stated:

> whatever impairment might be said to arise from this statute trenching upon the defendant's rights to speak his mind freely and communicate his personal views by sign and symbol is minimal . . . . *Ibid.*

And with respect to the state's interest invoked to justify restriction of Appellant's fundamental right:

> We think it beyond argument that the nation and state both have a recognizable interest in preserving the flag as a symbol of the nation and in keeping it free of extraneous adornment and alien markings and designs. *Ibid.*

The majority rejected the overbreadth challenge holding that the Appellant lacked standing to attack, on the ground of overbreadth, a statute which the court found unobjectionable as applied to him (App., *infra,* p. 34a). Two justices concurred in the result but took issue with the majority's treatment of the overbreadth issue on the ground that "[u]sing nonfirst amendment cases to support a first amendment issue undermines the majority rationale" (App., *infra,* at p. 43a).

Justice Finley dissented on the grounds that the Appellant's activity was protected under the First Amendment, that the statute under which he was convicted was unconstitutionally overbroad on its face and that in any event a conviction could not be upheld without proof of evil intent (App., *infra,* pp. 49a, 51a, 57a-58a).

The Questions Are Substantial

This case involves a serious incursion by the State of Washington on freedoms protected by the First Amendment. It presents for this Court's review a statute which restricts use—as distinguished from desecration—of the American flag, and does so in a manner which substantially curtails the right of citizens to engage in peaceful political speech.[3] Furthermore, the approach of the Washington Supreme Court to the First Amendment issues here presented reflects a restrictive view of the freedom of speech which is fundamentally at variance with the view of this Court.

1. *Appellant's activity was protected speech.*

Although his medium was neither spoken nor written words, Appellant's communication of his antiwar message

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[3] New York's virtually identical use statute was reviewed and struck down on First Amendment grounds in *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2nd Cir. 1970), *juris. statement filed*, 39 U.S. Law Week 3438 (No. 70-1507, March 24, 1971) and Connecticut's was more recently invalidated in *Thoms* v. *Heffernan*, 473 F.2d 478 (2d Cir. 1973), *pet. for cert. filed*, 41 U.S. Law Week 3555 (No. 72-1359, April 9, 1973).

Just recently, this Court granted review of a First Circuit decision holding a Massachusetts flag contempt statute unconstitutional. *Goguen* v. *Smith*, 471 F.2d 88 (1st Cir. 1972), *prob. juris. noted*, 41 U.S. Law Week 3616 (No. 72-1254, May 21, 1973). While the issues in *Goguen* are, of course, closely related to the ones tendered here, this case, like *Long Island Vietnam Moratorium Committee* v. *Cahn*, *supra*, presents the somewhat different question of a statute prohibiting improper use of the flag in the absence of an intent to desecrate it. Despite the possible distinction between the "desecration" statute at issue in *Goguen* and the "use" statutes at issue herein and in *Long Island Vietnam Moratorium Committee*, Appellant suggests that it would be appropriate to consider the cases together. It should be noted that no action has been taken in connection with the Jurisdictional Statement and Motion to Affirm in *Long Island Moratorium Committee*, *supra*, despite its pendency since April, 1971.

was speech. The display of his flag and peace symbol was expression comparable to the display of a different flag, *Stromberg* v. *California,* 283 U.S. 359 (1931), or the wearing of an armband, *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U.S. 503 (1969), or the holding of a silent vigil or other peaceful demonstration, e.g., *Brown* v. *Louisiana,* 383 U.S. 131 (1966); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963). As speech, Appellant's activity was presumptively entitled to protection under the First and Fourteenth Amendments, for it is "the usual rule that governmental bodies may not prescribe the form or content of individual expression," *Cohen* v. *California,* 403 U.S. 15, 24 (1971), and "the State has a heavy burden to demonstrate that [the proscription under review] presents . . . an exceptional case," *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 504 (1952). In assessing the prohibition enforced against Appellant, this Court "must weigh heavily the fact that communication is involved," *Grayned* v. *City of Rockford,* 408 U.S. 104, 33 L. Ed.2d 222, 232 (1972), and "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP* v. *Button,* 371 U.S. 415, 438 (1963).

Appellant contends that Washington's prohibition of his peaceful and respectful speech activity is not only unnecessary to the promotion of a compelling state interest, it cannot be justified by reference to any legitimate governmental interest whatsoever—that is, by reference to any interest "unrelated to the suppression of free expression." *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968).[4] Since

[4] In *Goguen* v. *Smith, supra,* 471 F.2d 88, the First Circuit reached the same conclusion about a flag contempt statute, after an exhaustive analysis of the state interests which might possibly be advanced by such a statute.

the state has the burden of demonstrating the contrary, it is appropriate to look first to the interest which it has tendered.

In its brief below (at p. 9), the state commented without elaboration:

> The legitimate state interest is, of course, preservation of the peace.

If this was, indeed, the state's concern, it could hardly justify a prosecution under the facts of this case. There is certainly nothing in the record to suggest that a disturbance was imminent. The quiet, unobtrusive symbolic display from Mr. Spence's window was observed only, so far as the record discloses, by three policemen, and there is no indication that they were in any way disconcerted. Indeed, the Washington Supreme Court did not even mention "preservation of the peace" as a reason for sustaining the statute. Preservation of the peace cannot be the legitimate interest in curtailing activity which poses no plausible threat to the peace. *Cohen* v. *California, supra,* 403 U.S. at 20. And surely the state's "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Independent Community School Dist., supra* at 508.[5]

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[5] In effect, Washington argues that placing a peace symbol on an American flag constitutes symbolic "fighting words" which the state may prohibit in the interest of preserving the public peace. E.g., *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942). However, the fighting words doctrine of *Chaplinsky* has never been extended to expression which merely shocks or annoys the public generally. Compare, *Chaplinsky* v. *New Hampshire, supra,* with *Cohen* v. *California, supra; Street* v. *New York, infra* and *Terminiello* v. *Chicago,* 337 U.S. 1 (1949).

In *Street* v. *New York*, 394 U.S. 576, 591 (1969), this Court enumerated four interests which would *not* justify the prohibition of speech critical or even contemptuous of the flag:

> (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem.

The Washington Court of Appeals, referring to the quoted passage, observed:

> If such interests are insufficient with respect to *words* . . . critical or contemptuous of the flag, they would clearly be insufficient as to *symbols* used conveying the same meaning as the words themselves; and a fortiori they would be insufficient as to symbols respectful of the flag and involving no physical destruction of any part thereof, the flag in conjunction with the peace symbol being used to passively communicate a constitutionally protected message. 5 Wn. App. at 761 (App., *infra*, p. 13a).

Nevertheless, the Washington Supreme Court found a

> recognizable interest in preserving the flag as a symbol of the nation and in keeping it free of extraneous adornment . . . . 81 Wn.2d at 799 (App., *infra*, p. 40a).

In explaining its concern for the "preservation of the flag as a symbol of the nation," the court offered three observations: (1) if Appellant's speech were protected, then there could be no restriction of use of the flag for commercial advertising purposes, (2) if Appellant's speech were protected, then the flag could be used to communicate obnoxious political, social, religious and philosophical ideas, and (3) Appellant might, in any event, express his views by other means (App., *infra*, pp. 40a-41a).

The "other means available" rationale was rejected by this Court in *Schneider* v. *State*, 308 U.S. 147, 163 (1939):

> one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

The concern over commercial exploitation of the flag presupposes that the boundaries of protected expression for commercial advertising purposes are coextensive with those of protected political speech, a view which this Court has not taken. See, e.g., *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942).[6]

Most significantly, the court's concern that the flag might be used to convey various obnoxious political, social, religious or philosophical messages points plainly to a content-oriented regulation of expression, which is offensive to the First Amendment.[7] See, *Schacht* v. *United States*,

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[6] *Halter* v. *Nebraska*, 205 U.S. 34 (1907), involved a state law against commercial use of the flag. It is not in point here, however, since it was decided before the First Amendment was held applicable to the states in *Gitlow* v. *New York*, 268 U.S. 652 (1925), and no First Amendment issues were considered.

[7] This concern is manifestly futile since, as the court acknowledges, "the statute does not bar the carrying of the American flag

398 U.S. 58, 63 (1970). The court below was clearly contemplating a statute *not* "unrelated to the suppression of free expression," *United States* v. *O'Brien, supra,* when it observed:

> If defendant cannot be constitutionally barred from affixing and displaying what he describes as a peace symbol upon the flag of the United States, neither can he be constitutionally prevented from proclaiming the Ku-Klux Klan upon it, nor the swastika, nor the hammer and sickle, either in advocacy of the Ku-Klux Klan, or Nazism, or Communism, or in opposition to these movements. 81 Wn.2d at 800 (App., *infra,* pp. 40a-41a).

Why, when it comes to the flag, would the Washington court be content to ban all expression rather than to risk exposure to a distasteful message? The words of Mr. Justice Jackson in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 641-2 (1943), quoted by the Court in *Street* v. *New York, supra* at 593, are, once again, especially apposite:

> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization . . . . [F]reedom to differ is not limited to things that do not matter

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in connection with other banners, flags, signs, symbols or devices," 81 Wn.2d at 799, so long as the symbols are not actually combined. Is it less distressing to conceive of the American flag and a swastika-imprinted banner flying side by side at the head of a parade than to conceive of the symbols combined?

much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

Suppression of obnoxious political ideas, even where their expression involves use of the American flag, is not a legitimate interest of a government limited by the First Amendment.

2. *The statute under which appellant was convicted is unconstitutionally overbroad and vague, and the appellant has standing to raise such claims.*

A statute is unconstitutionally overbroad if it sweeps within its prohibitions conduct which is protected under the First and Fourteenth Amendments. E.g., *Grayned* v. *City of Rockford, supra,* 33 L. Ed.2d at 231; *Gooding* v. *Wilson,* 405 U.S. 518, 520 (1972); *Zwickler* v. *Koota,* 389 U.S. 241, 249-50 (1967) and cases there cited. Accordingly, if Appellant's activity was protected speech, and if it was prohibited by §9.86.020(2), then the statute is unconstitutionally overbroad.

Additionally, in both the trial[8] and appellate courts below, Appellant cited other examples of protected expression which appear to fall clearly within the prohibitions of the challenged statute. The Washington Supreme Court refused to consider such examples on the ground that "[t]he judicial power to declare a legislative act unconstitutional should not be exercised in hypothetical cases," 81 Wn.2d at

[8] The trial court received in evidence as exhibits 1 and 2 the front page of the Seattle Post-Intelligencer, July 4th, 1970 edition, with the Declaration of Independence superimposed on the flag, and the front page of the Seattle Times of June 14, 1970 with pictures of two men superimposed on the flag above an article entitled "Patriotism: Activist and Hard-Hat."

795, App., *infra*, p. 34a, relying on this Court's decision in *Grayned* v. *City of Rockford*, *supra*. But this reliance was misplaced. In *Grayned*, the appellant did not claim that the application of an ordinance to his activity was invalid, yet this Court explicitly held that "[b]ecause overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge." 31 L. Ed.2d at 231. See also, e.g., *Gooding* v. *Wilson*, *supra*, 405 U.S. at 520-21.

In *Long Island Vietnam Moratorium Committee* v. *Cahn*, *supra*, 437 F.2d 344, the Second Circuit sustained an overbreadth challenge to a statute substantially like the one here at issue. The court, through Chief Judge Lumbard, observed that the New York statute:

> prohibits in clear language a myriad of uses of the flag, including not only the displaying of the emblems which plaintiffs have been distributing, but also the displaying of flags or flag-type buttons with patriotic slogans or pictures on them. It prohibits on its face all kinds of posters, buttons, symbols, slogans and emblems such as have been used for many years in election campaigns, patriotic movements, and so forth. *Id.* at 348.

The Second Circuit also held the statute unconstitutionally vague, finding the statutory language so broad that its meaning was uncertain and thus gave law enforcement officers "too much arbitrary discretion in determining whether or not a certain emblem is grounds for prosecution." 437 F.2d at 350.[9] In *Goguen* v. *Smith*, *supra*, the

[9] The Washington statute, like the one which the Second Circuit struck down, has reference not only to the traditional cloth flag of the United States, but to "any flag, standard, color, ensign or

First Circuit employed similar vagueness and overbreadth considerations to void the Massachusetts statute which made it a crime to "publicly treat contemptuously the flag of the United States."

The ruling below conflicts with these decisions and cannot withstand scrutiny under the analysis they employ.

Finally, the reach of the improper use statute is further broadened because, as construed by the Washington Supreme Court, it dispenses with the element of criminal intent. 81 Wn.2d at 792-93 (App., *infra*, pp. 31a-32a). By contrast, under Washington's flag *desecration* statute, §9.86.030, "intent to desecrate . . . must be established." *Ibid.* See, *State* v. *Turner*, 78 Wn.2d 276, 474 P.2d 91 (1970). Nevertheless, the court below held that the Appellant could be convicted under the flag use statute without any proof of *mens rea*.

This decision conflicts with rulings of this Court which have insisted upon criminal intent as a limiting principle on legislation that impinges on First Amendment rights.

A requirement of *mens rea* is the rule, rather than the exception in criminal law. See, *Smith* v. *California*, 361 U.S. 147, 150 (1959); *Dennis* v. *United States*, 341 U.S. 494, 500 (1951). And while this Court has not articulated a general doctrine of *mens rea*, see *Powell* v. *Texas*, 392 U.S. 514, 535 (1968), in many cases involving governmental regulation infringing on the First Amendment, the Court has required some form of intent, scienter or malice. See

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shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof." Revised Code of Washington §9.86.010.

generally, *Packer, Mens Rea and the Supreme Court,* 1962 The Supreme Court Review, 107, 125-27. Thus, for example, in *Scales* v. *United States,* 367 U.S. 203 (1961), the Court decided that in order to convict an individual under the membership clause of the Smith Act, a showing of active participation in the organization with knowledge of and specific intent to bring about its illegal objectives was necessary. See also, *Yates* v. *United States,* 354 U.S. 298 (1957); *Dennis* v. *United States,* 341 U.S. 494, 499, 500 (1951); *Watkins* v. *United States,* 354 U.S. 178 (1957). Similarly, a showing of criminal intent is constitutionally required in a prosecution under an obscenity law. *Smith* v. *California, supra; Mishkin* v. *New York,* 383 U.S. 502 (1966). Finally, similar requirements limit the imposition of non-criminal sanctions on protected First Amendment activity. See, e.g., *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279-80 (1964) (libel); *Wieman* v. *Updegraff,* 344 U.S. 183, 191 (1952) (inquiry into political beliefs).

In sum, whether or not a showing of *mens rea* is constitutionally compelled in all prosecutions, it should certainly be imposed as a requirement of statutes regulating First Amendment activity. The refusal of the court below to do so provides an additional reason for this Court to note jurisdiction.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

June 11, 1973

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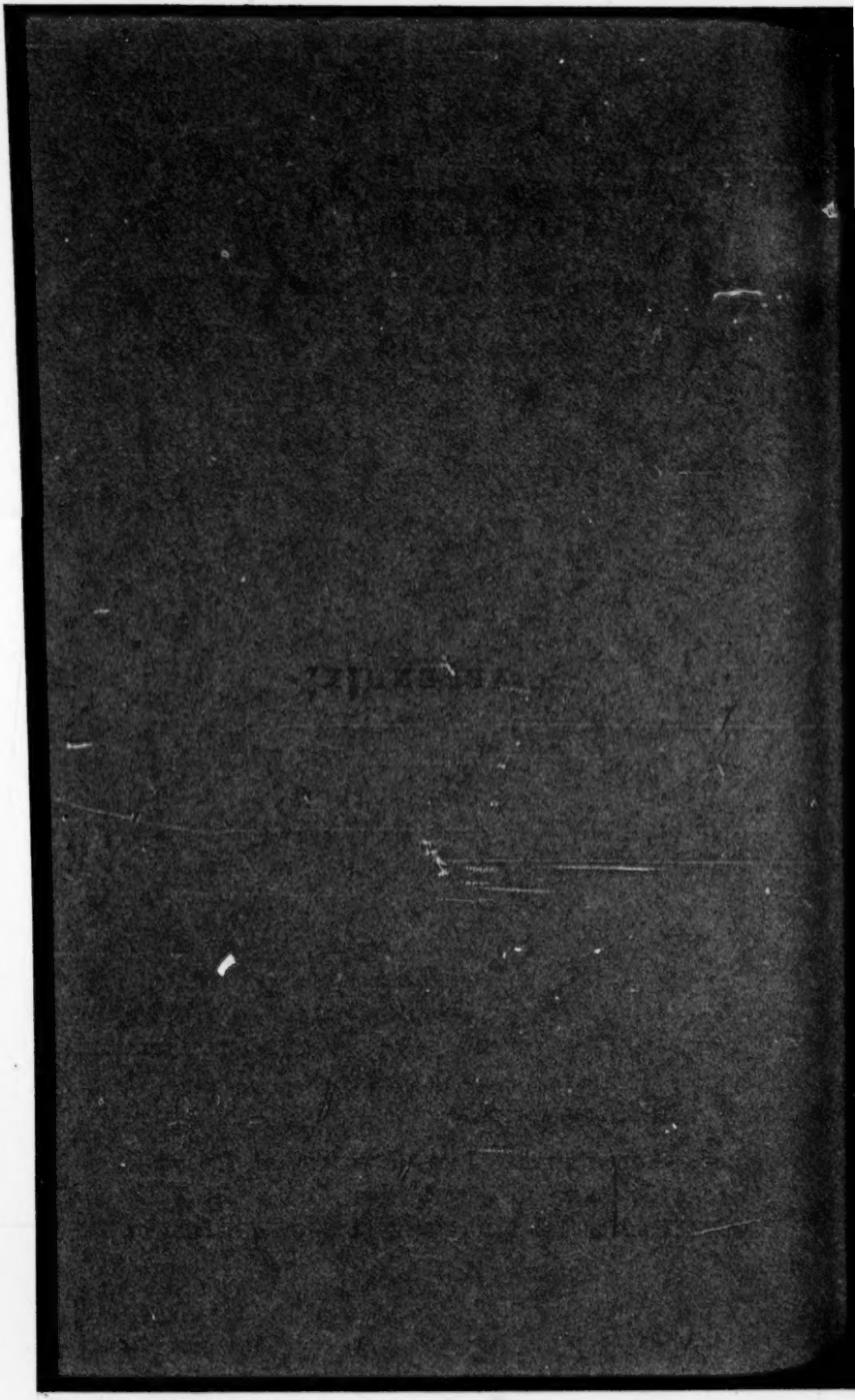
APPENDIX



Opinion of the Court of Appeals of Washington

[No. 854-1. Division One—Panel 1. November 15, 1971.]

THE STATE OF WASHINGTON, *Respondent*, v. HAROLD OMAND SPENCE, *Appellant*.

[1] Criminal Law—Appeal and Error—Review—Specific Crime Charged. Under the sixth amendment to the United States Constitution and Const. art. 1, § 22 (amendment 10) an appellate court must confine its review of the conviction appealed from to the violation actually charged.

[2] Flags—Use and Display—Criminal Prosecutions—Review. When a defendant is charged with violating RCW 9.86.020(1) and (2) and 9.86.010 dealing with improper flag use, and not charged with RCW 9.86.030 as amended which has heretofore been construed to include flag desecration, an appellate court must confine its review to the violation actually charged.

[3] Flags—Constitutional Law—Freedom of Speech—Flag Symbolism. The use of the United States flag or a representation thereof as a symbol of ideas is subject to the proper exercise of the state's police power to the extent that such regulation does not become a constitutionally impermissible restriction of the right of free speech.

[4] Flags—Constitutional Law—Freedom of Speech—Words Offensive to Sensibilities. Under the First Amendment as heretofore construed, even defiant or

contemptuous words spoken of the flag are protected free speech, and the fact that the words are offensive to the sensibilities of the average citizen is not the controlling test of whether the words are constitutionally protected free speech.

[5] Flags—Constitutional Law—Freedom of Speech—Symbolic Speech—In General. Thoughts and ideas, when conveyed by nonspeech symbols, constitute symbolic speech and are protected by the First Amendment. These include symbols not charged to have been used to show disrespect for the flag or used for the purpose of defiling or desecrating the flag and involving no physical destruction of any part thereof.

[6] Constitutional Law—Freedom of Speech—Conflict With Governmental Interests—Balancing. There must be an evaluation and balancing of competing interests when governmental and societal interests conflict with the constitutional right of free speech. Before a state's police power may be deemed to override the First Amendment there must be a state interest to be protected unrelated to the suppression of free expression, and the statutory restriction must be no greater than is essential to the furtherance of that interest. A restriction so broad that it strikes where no interest is served other than the proscription of expression is constitutionally impermissible.

[7] Flags—Constitutional Law—Freedom of Speech—Conflict With Governmental Interests—Flag Use. Under the First Amendment, the statutory prohibition of the act of affixing a symbol to the American flag and displaying the flag with the symbol so affixed

is not constitutionally permissible when the scope of the prohibition is not limited to protecting proper societal or governmental interests. To the extent that the prohibition is not so limited, the statute violates the constitutional principle that the statutory restriction must be one unrelated to the suppression of free expression and not broader than essential to the furtherance of that interest. Accordingly, the suppression of free expression of ideas by means of a symbol affixed to the national flag, involving neither desecretion nor destruction thereof, violates the First Amendment in the absence of narrowly drawn restrictions no broader than essential to the furtherance of governmental or societal interests the nature of which has been in part heretofore judicially determined.

[8] Flags—Constitutional Law—Freedom of Speech—Symbolic Speech—Attachment to Flag—Effect. A physical symbol which would be protected symbolic speech when displayed away from the flag even though in closest proximity thereto does not lose its constitutional protection solely because it is placed on the flag displayed.

[9] Flags—Statutes—Validity—Constitutionality—Overbreadth—What Constitutes. A statute relating to flag use is constitutionally overbroad if, while serving valid governmental or societal interests, it speaks in such broad terms as to impair, prohibit, or have a chilling effect upon the exercise of otherwise permissible free expression. Nothing in the doctrine of overbreadth derogates from the view that the American flag is entitled to our affection and respect.

[10] Statutes—Validity—Constitutionality—First Amendment Rights—Burden of Proof. When the issue is whether a statute violates the First Amendment there is no presumption that the statute attacked is constitutional and the state has a heavy burden to demonstrate that the limitation challenged is constitutionally permissible.

[11] Statutes—Validity—Constitutionality—First Amendment Rights—Standing to Challenge. Ordinarily one charged with violating a criminal statute has no standing to challenge the validity of the statute on account of overbreadth if he is not the victim of overbreadth. In a First Amendment case, however, he may rely on overbreadth on the face of the statute even if he thereby asserts that doctrine as to others and is not himself the victim of the overbreadth.

[12] Flags—Use and Display—Statutory Provisions—Validity. RCW 9.86.020(1) and (2), taken in conjunction with RCW 9.86.010 which forbids certain exhibition or display of the state or federal flag or representations thereof, are invalid as unconstitutionally overbroad.

WILLIAMS, J., dissents by separate opinion.

Appeal from a judgment of the Superior Court for King County, No. 54474, Charles R. Denny, J. Pro Tempore, entered October 29, 1970. *Reversed.*

Prosecution for improper display of the flag. Defendant appeals from a conviction and sentence.

David Allen, for appellant.

Christopher T. Bayley, Prosecuting Attorney, and *James E. Warme, Deputy*, for respondent.

HOROWITZ, C.J.—Defendant, after jury trial, was convicted of violating RCW 9.86.020(1) and (2), which forbids the improper use for exhibition or display of any flag of the United States as therein defined. On appeal he contends his conviction should be reversed and the charge dismissed because the statute violates his First Amendment rights. For the reasons next stated, we uphold his contention.

RCW 9.86.020(1) and (2) provide:

> No person shall, in any manner, for exhibition or display:
>
> (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or
>
> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement.

RCW 9.86.010 defines the word flag as follows:

> The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

The facts are these: Defendant, by the use of removable plastic tape, superimposed a peace symbol upon an American flag in his possession. He then displayed the flag containing the peace symbol to public view by hanging it out of his apartment window in Seattle, Washington, in an upside-down position. The plastic tape peace symbol consists of black lines forming a circle, which in turn contains black straight lines in much the form of an inverted trident. Defendant testified that his purpose in placing the peace symbol upon the flag displayed was to associate the flag with peace instead of war and violence, and to serve as a protest to the invasion of Cambodia and the killings at Kent State University, both of which events had occurred a few days before. He testified that he did not know that placing the plastic tape peace symbol upon the flag was against the law.

[1, 2] The state does not contend the information charged defendant with desecrating the flag—flag desecration being prohibited by RCW 9.86.030 as amended. Had flag desecration been the intended charge, it would have been necessary to include an allegation, in substance or effect, that defendant had committed "acts . . . done knowingly and intentionally with an intent or purpose of defiling and desecrating [the flag] or holding it publicly up to contempt." *State v. Turner*, 78 W.D.2d 276, 280, 474 P.2d 91 (1970). It is not claimed that such an intent was alleged in the information, nor is such intent relied upon to uphold the conviction below under RCW 9.86.020. Indeed, the state successfully contended below that intent to violate the statute under which the information was drawn was an unnecessary ingredient of the offense charged. We therefore confine ourselves, as we must, to a consideration of the actual charge on which defendant was convicted. U.S. Const.,

amend. 6; Const. art. 1, § 22 (amendment 10). As stated in *State v. Frazier*, 76 Wn.2d 373, 456 P.2d 352 (1969), at 376: "He cannot be accused of one crime and convicted of another."

[3] A flag may be considered from two aspects: (1) as a physical object, and (2) as a symbol of ideas. As a physical object, its ownership is subject to the proper exercise of the state's police power (*see* Cross, *The Diminishing Fee*, 20 Law & Contemp. Prob. 517 (1955), cited in *Sutherland v. Southcenter Shopping Center, Inc.*, 3 Wn. App. 833, 847 n.6, 478 P.2d 792 (1970)), and such ownership is protected by the Fifth and Fourteenth Amendments implemented, for example, by laws relating to trespass. As a symbol, its regulation is also subject to the proper exercise of the state's police power, but the use of the symbol is protectable, if at all, by the First and Fourteenth Amendments which provide a restraint upon the exercise of police power. *See Halter v. Nebraska*, 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419 (1907); *State v. Oyen*, 78 W.D.2d 934, 937, 480 P.2d 766 (1971); Annot., 22 L. Ed. 2d 972 (1970).

The basic question here involves a determination of whether the constitutional right of free speech (U.S. Const. amend. 1; Const. art. 1, § 5;[1] *Adams v. Hinkle*, 51 Wn.2d 763, 322 P.2d 844 (1958)) is violated by RCW 9.86.020(1) and (2) enacted under the state's police power, either as that statute is applied to defendant or on account of overbreadth.

Flags have a long and worldwide history. 9 Encyclopedia Britannica 398, *Flags* (22d ed. 1970); E.M.C. Barraclough,

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[1] Because the First Amendment provides an adequate basis for the disposition of the question involved, it is unnecessary to determine whether article 1, section 5 compels a like conclusion. Reference to the American flag applies by a parity of reasoning to the state flag.

Flags of the World (Rev. ed. 1965); Quaife, The Flag of the United States (1942). They serve a variety of functions. Thus, they may be used as a reminder of an historic past, a mirror of a peaceful or turbulent present, and a promise of conditions hoped for or of events to come. The American flag is similarly used. The American flag, however, has its own communicating function. Its content finds expression and use based on American experience, American values and American outlook. The flag does not bear a single message, orthodox or unorthodox; nor is it the sole preserve of government or the sole preserve of any one person, group or interest. It does not serve to freeze past or existing institutions or past or existing points of view. Born out of the vicissitudes of change, and itself a striking and eloquent manifestation of that change, it would be strange indeed if it proved inhospitable to the constitutionally protected appeal for change by lawful means. Hence, the flag is both an appeal for loyalty to existing America, its policies and its ideals, and an invitation for peaceful change to bring America closer to heart's desire. In short, the American flag is an identifying, history-preserving and ideological symbol. As stated in *Parker v. Morgan*, 322 F. Supp. 585 (W.D. N.C. 1971), at 588:

> If the flag says anything at all, and we agree it often may in a given context, we think it says everything and is big enough to symbolize the variant viewpoints of a Dr. Spock and a General Westmoreland. With fine impartiality the flag may head up a peace parade and at the same time and place fly over a platoon of soldiers assigned to guard it.
>
> . . . Sometimes the flag represents government. . . . Always it represents America—in all its marvelous diversity.

It is understandable that a concern for the preservation of the flag's symbolism should find expression, all over the land and in a variety of contexts, in federal and state statutes designed to protect the American flag and representations of that flag against both misuse and disrespect. *See e.g.,* 4 U.S.C.A. §§ 1-3; 36 U.S.C.A. §§ 172-178, 182; RCW 9.86.010-.070 (Uniform Flag Law); RCW 9.05.100-.140. Indeed, a body of law—albeit somewhat small—has developed with respect to how statutory enactments dealing with the flag should be regarded. *See generally,* 35 Am. Jur. 2d, *Flags* §§ 1-5 (1967, Supp. 1971); 36A. C.J.S., *Flags* §§ 1-6 (1967, Supp. 1971); Annot., 22 L. Ed. 2d 972 (1970); Note, *Exploiting the American Flag: Can the Law Distinguish Criminal from Patriot?,* 30 Maryland L. Rev. 332 (1970).

[4, 5] From the case law it is clear that even defiant or contemptuous words spoken of the flag are protected free speech; and the fact that the words would be offensive to the sensibilities of the average citizen is not a controlling consideration. *Street v. New York,* 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969). Thought and ideas, however, may be conveyed by nonspeech symbols as well as by words. Such symbols when so used constitute symbolic speech which is protected by the First Amendment. *Tinker v. Des Moines School Dist.,* 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969). Furthermore, a statute mandating respect for the flag, as in the case of a compulsory flag salute, is a violation of the First Amendment. *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, 147 A.L.R. 674 (1943). Even the display of an alien red flag symbolizing opposition to the American government is constitutionally protected free speech.

Stromberg v. California, 283 U.S. 359, 75 L. Ed. 1117, 51 S. Ct. 532, 73 A.L.R. 1484 (1930).

It might be suggested that the state has the right to regulate the nonspeech aspects of conduct as long as the regulation does not impair or regulate speech itself. *Cf., Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 93 L. Ed. 834, 69 S. Ct. 684 (1949); *Adderley* v. *Florida*, 385 U.S. 39, 17 L. Ed. 2d 149, 87 S. Ct. 242 (1966). This view is the rationale, for example, of the majority opinion in *People v. Radich*, 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970), affirmed per curiam by an equally divided court, 402 U.S. 989, 28 L. Ed. 2d 287, 91 S. Ct. 1217 (1971). Whatever workability this rule may possess in the presence of actual speech, the rule may well be unworkable in the presence of conduct which itself is constitutionally protected symbolic speech and is nonseverable therefrom. Thus, the wearing by high school students of black armbands to protest American policy in Vietnam is conduct and is nonseverable from the symbolic speech exemplified by the armbands (*Tinker v. Des Moines School Dist., supra*); and a compulsory flag salute statute which regulates or mandates conduct also runs afoul of constitutional provisions which prevent government from prescribing what is "orthodox in politics, nationalism, religion, or other matters of opinion . . ." *West Virginia State Bd. of Educ. v. Barnette, supra*, Mr. Justice Jackson at page 642. *See also Stromberg v. California, supra*, and *Gregory v. Chicago*, 394 U.S. 111, 22 L. Ed. 2d 134, 89 S. Ct. 946 (1969).

[6] It has also been pointed out that the constitutional right of free speech is not absolute and does not automatically and mechanically prevail against statutes protecting legitimate governmental interests by prohibition or regulation of designated conduct with respect to the flag. Thus, a

statute may prohibit the use of a flag for commercial advertising purposes (*see Halter v. Nebraska, supra*); or a statute may protect the dignity of a foreign flag pursuant to an obligation imposed by international law (1 L. Oppenheim, International Law § 121 (7th ed. 1948); 2 G. Hackworth, Digest of International Law § 127 (1941); G. Wilson, *Respect for National Flag*, 29 Am. J. of Int'l Law 662 (1935)); or a statute may protect the flag if so to do protects the safety of the state against a clear and present danger. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 86 L. Ed. 1031, 62 S. Ct. 766 (1942); *Schenck v. United States*, 249 U.S. 47, 63 L. Ed. 470, 39 S. Ct. 247 (1919); *State ex rel. Holcomb v. Armstrong*, 39 Wn.2d 860, 239 P.2d 545 (1952). It is conceivable, although we do not determine the matter, that a statute may properly seek to preserve a privately owned flag of historic importance; or a statute may protect the identifying function of the flag at home and abroad against substantial impairment; or a statute may regulate the form of a military salute in America's armed forces. Furthermore, it may be assumed that a statute may properly protect the encouragement of love of country. *See Halter v. Nebraska, supra.* These are independent and protectable governmental interests.

The problem of reconciling protection of legitimate governmental interests with the demands of free speech calls for an evaluation of competing interests and the striking of a balance that will mark the boundaries between what is constitutionally permissible and what is constitutionally impermissible. *See State v. Oyen*, 78 W.D.2d 934, 943-44, 480 P.2d 766 (1971). The doctrine of balancing was articulated in *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), a draft card burning case. *O'Brien* held that before a state's police power would be

deemed to override the First Amendment there would have to be a state interest to be protected "unrelated to the suppression of free expression," and the statutory restriction would have to be "no greater than is essential to the furtherance of that interest." 391 U.S. at 377. The statute may not be "so broad that it strikes where no interest is served other than the proscription of expression." *Hodsdon v. Buckson*, 310 F. Supp. 528, 534 (Del. 1970).

[7] In our opinion the statutory prohibition of the act of affixing a peace symbol to the American flag and displaying the flag with the peace symbol so affixed from a window is not constitutionally permissible as protection of a societal or governmental interest "unrelated to the suppression of free expression" as required by *O'Brien*. The prohibition of defendant's conduct does not fall within the class of any of the constitutionally permissible prohibitions already discussed, nor are the possible societal interests listed by Mr. Justice Harlan in *Street v. New York, supra*, available as justification for the statutory prohibition concerning the flag use involved here. The interests held insufficient to justify the prohibition of words critical or even contemptuous of the flag are discussed as follows by Mr. Justice Harlan in *Street v. New York, supra*:

> (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passersby who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words

upon others, showed proper respect for our national emblem.

394 U.S. at 591. If such interests are insufficient with respect to *words* considered in *Street v. New York, supra,* critical or contemptuous of the flag, they would clearly be insufficient as to *symbols* used conveying the same meaning as the words themselves; and a fortiori they would be insufficient as to symbols respectful of the flag and involving no physical destruction of any part thereof, the flag in conjunction with the peace symbol being used to passively communicate a constitutionally protected message. To prohibit defendant's conduct in the instant case when such conduct is nonseverable from a constitutionally protected message may in effect constitute a prohibition of free speech itself, and thus be violative of the First Amendment as construed in *United States v. O'Brien, supra.*

[8] The next question presented, therefore, is whether a peace symbol, which would be protected symbolic speech if used away from the flag (*see Street v. New York, supra; Stromberg v. California, supra; Tinker v. Des Moines School Dist., supra; West Virginia State Bd. of Educ. v. Barnette, supra*), has no such special constitutional protection when the peace symbol is placed upon the flag itself. If the flag mirrors American experience, past and present; and if respect for the flag cannot constitutionally be compelled by a mandatory flag salute; and if symbolic opposition to the flag cannot be prohibited; and if symbolic as well as actual speech is entitled to constitutional protection; and if the suppression of free expression cannot be upheld in the absence of an independent governmental interest to be protected, unrelated to the suppression of free expression and not broader than is necessary for that pur-

pose; and if offense to the sensibilities of the average citizen is not enough to condemn the exercise of free speech—can it be said to really matter, on a balancing of interests, whether the words or symbols are used away from the flag or representations thereof even though in closest proximity thereto, or whether such words or symbols are used on the flag itself. The case nearest in point on this issue—apart from flag desecration cases involving the flag itself already cited—the rationale of which is applicable here, is *Long Island Vietnam Moratorium Comm. v. Cahn,* 437 F.2d 344 (2d Cir. 1970). That case, in a unanimous opinion by Chief Judge Lumbard, held that a peace symbol placed on a representation of the American flag was protected symbolic speech and that the New York Flag Use Statute (General Business Law of New York § 136(a), substantially identical with RCW 9.86.020(1) and (2)) violated the First Amendment because overbroad, vague and permitting selective enforcement of "only that expression which local officials will tolerate." 437 F.2d at 350. The court could see no difference in principle between its case and the words in *Street v. New York, supra.* Neither can we.

The doctrine of *Long Island Vietnam Moratorium Comm. v. Cahn, supra,* is necessarily supported by recent federal cases involving the flag itself that have invalidated flag desecration statutes as violative of the First Amendment because of overbreadth and vagueness. *Parker v. Morgan,* 322 F. Supp. 585 (W.D. N.C. 1971); *Hodsdon v. Buckson, supra; Crosson v. Silver,* 319 F. Supp. 1084 (Ariz. 1970). The case law on the validity of flag desecration statutes is not unanimous, however. *See inter alia State v. Turner,* 78 W.D.2d 276, 474 P.2d 91 (1970), in which the validity of former RCW 9.86.030 is assumed; *Sutherland v. DeWulf,* 323 F. Supp. 740 (S.D. Ill. 1971); *People v. Radich, supra;*

Hoffman v. United States, 256 A.2d 567 (D.C. Ct. App. 1969); *Joyce v. United States,* ..... F.2d ..... (D.C. Cir., 1971), slip opinion, October 26, 1971. The instant case does not involve flag desecration and we need not determine whether the conclusion reached here concerning improper flag use likewise applies to flag desecration.

[9] It should be noted that the decisions invalidating flag-desecration statutes or improper-use statutes do not hold that a flag-use statute or a flag-desecration statute cannot under any circumstances be enacted. We have already pointed out that a state may protect a governmental interest under the limitations recognized in *United States v. O'Brien,* 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). The statute, however, cannot speak in such broad terms as to impair, prohibit or have a chilling effect upon the exercise of constitutionally protected rights of free speech. As stated in *NAACP v. Button,* 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963), "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms" (371 U.S. at 438) because these freedoms need "breathing space to survive" (371 U.S. at 433).

[10, 11] When the issue is whether a statute violates the First Amendment, it was recognized in *Adams v. Hinkle,* 51 Wn.2d 763, 322 P.2d 844 (1958), following the federal rule, that there is no presumption that the statute attacked is constitutional and that " 'the State has a heavy burden to demonstrate that the limitation challenged . . .' " is constitutionally valid. 51 Wn.2d at 769. Furthermore, a defendant charged with violating a statute ordinarily has no standing to assert the doctrine of overbreadth if he is not its victim (*State v. Cashaw,* 4 Wn. App. 243, 480 P.2d 528 (1971)); yet in a First Amendment case he does have stand-

ing to rely upon overbreadth on the face of the statute in either federal or state courts even if he thereby asserts overbreadth as to others. *United States* v. *Raines*, 362 U.S. 17, 21-22, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960); *Dombrowski v. Pfister*, 380 U.S. 479, 486, 14 L. Ed. 2d 22, 85 S. Ct. 1116 (1965); *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 84 L. Ed. 1093, 60 S. Ct. 736 (1940); *Fort v. Civil Service Comm'n*, 61 Cal. 2d 331, 392 P.2d 385, 389-90, 38 Cal. Rptr. 625, 630 (1964); *In re Davis*, 242 Cal. App. 2d 645, 51 Cal. Rptr. 702, 716-17 (1966); 2 C. Antieau, Modern Constitutional Law § 15.23 (1969).

Should overbreadth exist the statute itself may be invalidated, or the overbroad application of the statute to the defendant will be negated. As stated in *NAACP v. Button*, *supra* at 432:

> [I]n appraising a statute's inhibitory effect upon [First Amendment] rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.

Such an approach lessens the danger of tolerating "a penal statute susceptible of sweeping improper application." *NAACP v. Button*, *supra* at 432-33. *See generally*, R. Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L. J. 599 (1962); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970); Note, *Exploring the American Flag: Can the Law Distinguish Criminal From Patriot?*, 30 Maryland L. Rev. 332 (1970).

[12] The instant case illustrates overbreadth on the face of RCW 9.86.020(1) and (2), not only with respect to the American flag itself, but also with respect to the items

included in the statutory definition of the flag. RCW 9.86.010 makes it plain that the statutory prohibition is not limited to the flag itself. It also extends to any "flag, standard, color, ensign or shield, . . . or copy, picture, or representation thereof . . . of any size, evidently purporting to be such . . . of the United States or of this state . . ." We need only consider the application of the statute to a representation of the flag, as distinguished from other items included in the flag definition, to make the point of overbreadth and illustrate its consequences. Thus it is arguable, although we need not determine the matter, that the definition, when read in conjunction with RCW 9.86.020, would have prohibited both the use of a picture of the flag over the words as was done by the Seattle Post-Intelligencer in its July 4, 1970 edition (Seattle Post-Intelligencer, July 4, 1970 at page 1), and the publication by the Seattle Times of a picture of the American flag on which a person's picture might be said to have been superimposed (Seattle Times, June 14, 1970 § A, page 1). (Appellant's exhibits 1 and 2.) Patriotic, public-spirited or ideological slogans such as "love America," "liberty," "brotherhood," "to our honored dead," or even "July 4, 1776," if placed upon a picture of the flag, would be illegal. It would also be illegal to continue the long practice of using the flag or its representation in conjunction with the symbols prohibited by the statute notwithstanding the fact that this practice has been a traditional mode of free expression commonly used by both major and minor political parties throughout our history.

It would be irresponsible to suggest that the common use of flag representations to provide ideological emphasis or support for words or symbols considered public-spirited or patriotic, or in the course of political campaigns, proceeds

upon any assumption other than the assumption that the use is entirely lawful and, to the more sophisticated at least, that such use is protected free speech. It must be remembered, however, that the right of free speech, symbolic or actual, is not limited to a message orthodox and uncontroversial, nor is it limited to words or symbols that would not affront the average citizen's sensibilities in the absence of a protectable governmental interest requiring otherwise. *See e.g., Street v. New York,* 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969); *United States v. O'Brien, supra; West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, 147 A.L.R. 674 (1943). It is not suggested that the constitutionality of a statute be determined by the logical application of a widely held public opinion. This is because wishes expressing strongly held values and constitutional text may differ. Should such a difference exist, it would be our duty to follow the text. Yet if the text speaks in general terms requiring implementing definition by the court, such implementing definition must be a rational and reasonable one. Should the implementing definition be in conformity with the logical implications of publicly held values, the rational character of the implementing definition would be supported by that fact. We think that support exists here.

This being a First Amendment case, the defendant, even though not the victim of the overbreadth described in *Long Island Vietnam Moratorium Comm. v. Cahn, supra,* with respect to flag representations, nevertheless has standing to take advantage of the overbreadth doctrine. *See United States* v. *Raines, supra; Dombrowski v. Pfister, supra; Thornhill v. Alabama, supra; Fort v. Civil Serv. Comm'n, supra; In re Davis, supra.* We conclude that RCW 9.86.020

(1) and (2) is invalid as unconstitutionally overbroad on its face.

In so concluding, we recognize that the problem here with respect to which we have both power and duty is only to determine whether the defendant had the constitutional right to do what he did. We judicially know that the exercise of the right of free speech often has emotional overtones. At one extreme such an exercise is regarded as a raw and irrational contest between government on the one hand and an irresponsible individual on the other. To others the exercise of the right of free speech is but the assertion of what the literal meaning of the First Amendment permits. The doctrines of symbolic speech and overbreadth as developed by the courts adopt neither extreme and seek to give effect both to the proper societal interest of the state and nation without rejecting the proper free speech demands of the individual. Under that doctrine, the American flag continues to be entitled to our affection and respect as described in *Halter v. Nebraska*, 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419 (1907). *Halter*, however, no more controls our decision in this case than does the latest case dealing with flag desecration which requires intent to desecrate as distinguished from flag use, which does not. *Joyce v. United States, supra; State v. Turner*, 78 W.D.2d 276, 474 P.2d 91 (1970). *Halter* was concerned with a portion of the Nebraska flag statute similar to RCW 9.86.020(3), not (1) or (2). It dealt with the validity of a statute forbidding the exploitation of the American flag in the sale of a product, namely, exploitation in the form of a representation of the American flag imprinted on a bottle of beer for purposes of advertisement. *Halter* had no occasion to discuss either the First Amendment, symbolic speech, or the doctrine of overbreadth—and did not do so. *See generally*, 16 Am. Jur. 2d,

Constitutional Law § 348 (1964). What we do here is merely to give proper weight to cases, including those referred to in this opinion, decided subsequent to *Halter* that, without departing from *Halter*, have developed the doctrine of symbolic speech in light of the doctrine of overbreadth.

In our opinion, RCW 9.86.020(1) and (2) would not violate the First Amendment if more narrowly drafted to protect a proper governmental interest as described in *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). Although we express no opinion on the text of a proposed narrower draft of a flag desecration statute such as RCW 9.86.030 as amended, not here charged to have been violated by defendant, a suggested statute setting forth what its author contends is a protectable governmental interest is contained in Note, *Flag Desecration: Illegal Conduct or Protected Expression?*, 22 Case Western Reserve L. Rev. 555, 573 (1971). *See* Note, *Less Drastic Means and the First Amendment*, 78 Yale L. J. 464 (1969).

The judgment is reversed with directions to dismiss the charge.

UTTER, J., concurs.

WILLIAMS, J. (dissenting)—The principal question in this case simply stated is: Does the interest of the citizens of the state of Washington in the preservation of the integrity of the American flag transcend the desire of appellant to publicly proclaim his political views by the use of that flag as a backdrop or billboard? I believe the essential purpose of the flag should be preserved and that our state government has properly prohibited the use which appellant would make of it.

In essence, appellant's argument is that he has a right protected by the First Amendment to employ the American

flag to express and convey his ideas and to make alterations to the flag best suited to his purposes. There is no doubt that an American flag so employed will attract attention and that a message placed thereon either in words or by symbol will be broadcast.

Freedom of speech is not beyond all control. A state interest and the general good may take precedence over the exercise of unfettered personal liberty. The test for determining whether a public interest is superior to the individual's exercise of free speech is stated in *United States v. O'Brien*, 391 U.S. 367, 377, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968) as follows:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The statute in question is well within the requirements of these criteria.

The United States Supreme Court in *Halter v. Nebraska*, 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419 (1907), decided that a state may prevent the misuse of the American flag, not only to prevent breaches of the peace generated thereby, but also because

> [i]t is not extravagant to say that to all lovers of the country it [the flag] signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong;

> security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression. As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected.

Should the law be, as contended by appellant, that each citizen under the guise of "symbolic speech," is free to mutilate or disfigure the flag to express his ideas, good or bad, then the essential purpose of the flag, which Woodrow Wilson called "the emblem of our unity, our power, our thought, and our purpose as a nation," will be destroyed. M. Krythe, What So Proudly We Hail 26 (1968). The interest of every citizen as well as that of the state of Washington in the preservation of the flag, unmarked and unsullied, overrides appellant's privilege of citizenship and his personal liberty merely to the extent that he must find some other means, of which many are available, to express his ideas. *See Joyce v. United States,* —— F.2d —— (D.C. Cir. 1971), slip opinion, October 26, 1971; *People v. Radich,* 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970), *aff'g by an equally divided court,* 400 U.S. 864, 28 L. Ed. 2d 287, 91 S. Ct. 1217 (1971).

Our Supreme Court in *State v. Oyen,* 78 W.D.2d 934, 943, 480 P.2d 766 (1971) had this to say:

In applying the concept in situations where freedom of speech may be concerned, it is essential to bear in mind that an otherwise valid statute, which, in protecting important societal interests, makes a particular course of conduct illegal, does not run afoul of the constitution merely because the right of free speech may be intermingled with the condemned conduct. *Cox v. Louisiana, supra,* [379 U.S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453 (1965)]; *United States v. O'Brien,* 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968); *Cameron v. Johnson,* 390 U.S. 611, 20 L. Ed. 2d 182, 88 S. Ct. 1335 (1968); *Adderley v. Florida,* 385 U.S. 39, 17 L. Ed. 2d 149, 87 S. Ct. 242 (1966); *Kovacs v. Cooper,* 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448 (1949).

In such situations, however, it is incumbent upon the court to weigh the purported impairment of speech engendered by the statutory provision against the importance of the societal interest sought to be vindicated by the statute, as well as the nature and extent of the threat which the statutorily forbidden conduct poses to that interest. And, too, the alternatives available to the state and the claimant must be evaluated, *i.e.,* whether the state may achieve its ends in a less restrictive manner and/or the claimant effect his communication in a way less detrimental to the societal interest.

As seen, the statute protects an important societal interest, whereas appellant has suffered a very slight impairment of his method of expression and no strictures on speaking, writing, or conveying his ideas by any other means. *Oyen* is a much more provocative case than the one presented here, because the defendants in *Oyen* were arrested for engaging in pamphleteering, one of the truly

historical methods of public dissemination of political views. The Supreme Court applying the test above set out held that even though the pamphleteering was conducted on a walkway outside of school buildings, it must yield to the interest of the state in maintaining a scholastic atmosphere for students of the school.

As to appellant's contention that the statute does not meet the constitutional test of due process because it is vague, I believe that it is sufficiently definite to inform a person with reasonable precision what acts are prohibited, so that he may have a certain, understandable rule of conduct and know what acts he must avoid. *State v. Oyen, supra.*

It is of no importance that appellant was arrested for violation of a flag misuse law rather than one for desecration containing an element of contemptuous intent because the power of the state to further the peoples' interest by protecting the flag may be exercised irrespective of evil or malice. *State v. Turner,* 78 W.D.2d 276, 474 P.2d 91 (1970). The statute with which we are concerned has for its purpose the preservation of unmarked national and state symbols. The prohibition is against all disfigurement, no matter how noble the thought behind it.

Freedom of speech does not, in my view, include freedom to publicly use the American flag in the manner employed by appellant, in the face of an acknowledged societal interest in the flag. Although it may be important to appellant to express his views in this novel way, he should remember that the United States, as symbolized by the American flag, is important too.

The judgment should be affirmed.

Opinion of the Supreme Court of Washington

[No. 42256. En Banc. Jan 18 1973]

THE STATE OF WASHINGTON, *Appellant*, v. HAROLD OMAND SPENCE, *Respondent*.

[1] Criminal Law—Defenses—Ignorance of Law. Absent insanity, all persons are presumed to know the law and are held responsible for their free and voluntary acts and deeds.

[2] Flags—Use and Display—Addition of Design—Elements of Crime—Intent. RCW 9.86.020, which prohibits the placing of any design or symbol upon the flag of the United States, or the displaying of a flag so marked, defines an offense which is malum prohibitum and which requires no proof of evil intent or motive but only a voluntary and knowing act in order to constitute a violation of the statute.

[3] Statutes—Validity—Standing to Challenge—Constitutionality. A party may not urge the unconstitutionality of a statute unless he has been adversely affected by the features of the statute about which he makes his complaint.

[4] Criminal Law—Statutes—Validity—Challenge in the Abstract. Judicial power should not be exercised in hypothetical cases to declare a legislative act unconstitutional.

[5] Criminal Law — Statutes — Certainty — Standard of Guilt. A criminal statute which leaves the standard of

guilt to the variant views of the different courts and juries which may be called upon to enforce it is unconstitutionally vague.

[6] Flags—Constitutional Law—Freedom of Speech—Symbolic Speech—Addition of Design. RCW 9.86.020, which prohibits the placing of any design or symbol upon the flag of the United States, or the displaying of a flag so marked, does constitute a limitation on speech, symbolic or otherwise, and is both precise in its terms and its breadth and is constitutional.

[7] Flags—Use and Display—Statutory Provisions—Validity. A nation has a right to adopt a national emblem and the member states have a right to adopt statutes regulating its use and protecting it from abuse and misuse.

Stafford and Hamilton, JJ., concur by separate opinion; Finley, J., dissents by separate opinion; Utter and Brachtenbach, JJ., did not participate in the disposition of this case.

Appeal from a decision of the Court of Appeals, November 15, 1971, 5 Wn. App. 752. *Reversed.*

The Court of Appeals reversed a judgment of the Superior Court for King County, No. 54474, Charles R. Denney, J. Pro Tempore, entered October 29, 1970. Respondent (prosecution) appealed to the Supreme Court.

Prosecution for improper display of the flag. Defendant appealed to the Court of Appeals from a conviction and sentence.

IN THE

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 42256

EN BANC

Filed Jan 18 1973

THE STATE OF WASHINGTON,

Appellant,

v.

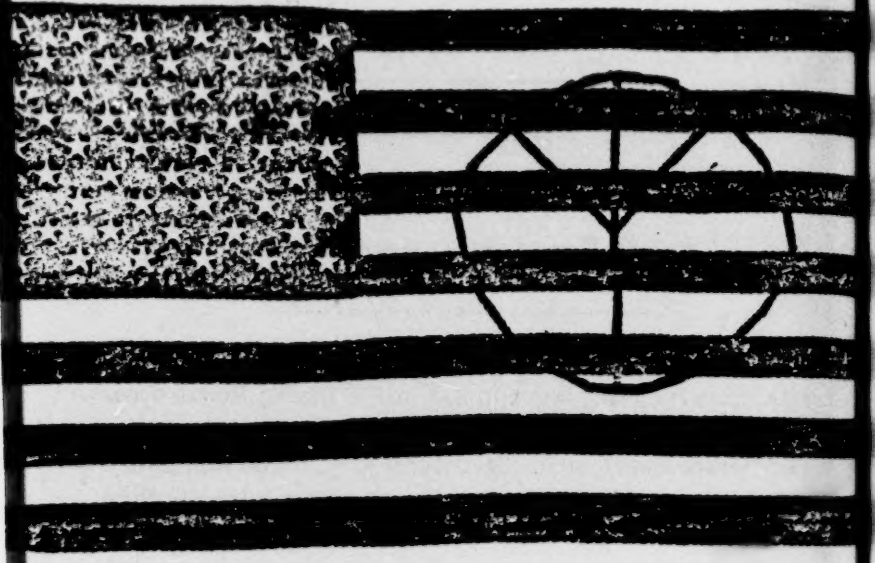
HAROLD OMAND SPENCE,

Respondent.

Defendant was charged in King County Justice Court with unlawfully displaying a flag of the United States upon which he had affixed a design or picture to both surfaces. The Justice Court, sitting without a jury, found him guilty and sentenced him to 90 days' confinement with 60 days suspended. Defendant appealed to the King County Superior Court where a jury found him guilty. On an agreed statement of facts, he appealed the judgment and sentence of 10 days' confinement, suspended, and a fine of $75, and costs entered on the verdict. The Court of Appeals reversed with one judge dissenting (5 Wn. App. 752 (1971)); the state obtained review by appeal to this court under Rule on Appeal II-2, and we reverse the Court of Appeals.

That the flag (exhibit No. 3) upon which defendant had taped a picture or diagram was an actual flag of the United States is clear, so acknowledged by both prosecution and

defense and so recognized by this court. It measures about 58 inches long and 35 inches wide. On both faces, defendant had outlined in glossy, black plastic ½-inch tape a large circular diagram about 19½ inches in diameter, inside of which was laid out in the same plastic tape another symbol resembling a trident.



The trident consisted of a 19½-inch line of plastic tape forming a vertical diameter and two 10-inch lines running from the approximate center on either side of it to intersect the circumference at a point approximately 6 inches from either side of the diameter. The whole design was set in about 4 inches from the top of the flag, 9¼ inches from the bottom, and about 6½ inches from either edge. It thus occupied nearly one-half of the entire surface of the flag. Defendant calls it a symbol of peace. He had placed the

symbol on both surfaces of the flag and suspended the flag upside down from his apartment window. According to the agreed statement of facts:

> The uncontroverted testimony of the state's witnesses, three Seattle police officers, was: they observed a flag with a masking tape peace symbol attached thereto, hanging upside down out of a window at 1006 E. Prospect Street, Seattle, Washington; they entered the main door of the apartment building and were met by the defendant who said, "I suppose you are here about the flag. I didn't know there was anything wrong with it. I will take it down"; the defendant allowed the officers to enter his apartment where the flag was located; the officers arrested the defendant and seized the flag; the defendant co-operated with the police officers.
>
> The state introduced, and the court admitted, the flag with the masking tape peace symbol. (It was identified as Exhibit No. 3). The state rested its case.
>
> The defendant, Mr. Spence, took the stand and testified on his own behalf. The defendant testified that he put a peace symbol on the flag and displayed it to public view as a protest to the invasion of Cambodia, and the killings at Kent State University, both of which had occurred a few days previously. Mr. Spence said his purpose of putting the peace symbol on the flag was to associate the American flag with peace instead of war and violence. He testified that he choose [*sic*] masking tape so that the peace symbol could be removed without damaging the flag. He said that he did not know that placing masking tape on a flag was against the law.

Defendant was not convicted of violating the flag desecration statute. RCW 9.86.030. *See State* v. *Turner*, 78 Wn. 2d 276, 474 P.2d 91 (1970). He was convicted of violating RCW 9.86.020(1) and (2), the alteration or improper use statute, which states:

> No person shall, in any manner, for exhibition or display:
>
> (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or
>
> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement;

Defendant attacks the constitutionality of RCW 9.86.020 (1) on two grounds: (1) that it violates the freedom of speech guarantees of the first amendment to the Constitution of the United States, and article 1, section 5, of the Constitution of the State of Washington, and (2) that the statute is unconstitutionally vague and overbroad when read with RCW 9.86.010, which states:

> The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purport-

ing to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

Defendant said that the diagram stood for peace. It depicted his protest against the invasion of Cambodia by American troops, and the killing of students at Kent State University when a unit of the Ohio National Guard fired upon them during a student demonstration. Both the invasion of Cambodia, an American military action undertaken by United States forces as an operation of the Vietnam war, and the shootings at Kent State had occurred shortly prior to the events of this case. Defendant said that he was unaware that taping the symbol upon and displaying the flag was against the law. He did not contend, however, that he was unaware that the cloth upon which he affixed the symbol was an actual flag of the United States of America.

As to his knowledge of the law, that point is readily determined by the long-standing and basic principles upon which our legal system depends, that all sane persons are presumed to know the law and are in law held responsible for their free and voluntary acts and deeds. 21 Am. Jur. 2d *Criminal Law* § 94 (1965).

Defendant first contends that the prosecution failed to supply evidence and the court refused to instruct that an element of the offense charged was criminal or evil intent, and that, therefore, he should have been acquitted because of the state's failure to prove an element of the crime charged. He cites, *inter alia, State* v. *Turner, supra,* a flag burning and desecration case maintained under RCW 9.86.030. That holding, in our view, does not support defendant's position, but contrarily militates against it, for

it is based upon the fundamental distinctions between conduct proscribed as malum prohibitum and conduct malum in se.

In *Turner*, the defendant was charged under RCW 9.86.030 (amended in Laws of 1969, 1st Ex. Ses., ch. 110, p. 823), with flag desecration by burning, and we held that intent to desecrate was an element that must be established by the prosecution. Under RCW 9.86.020, however, under which the complaint here is laid, evil intent or design is not an element. A violation is complete when one knowingly places any word, figure, mark, picture, design, drawing or advertisement upon the flag of the United States, or flies a flag so marked. All that is required to complete the offense is to knowingly perform the prohibited act, and it is immaterial—except for consideration of punishment—whether the act was done with an evil motive or an exalted one. The question of criminal intent or evil purpose, therefore, does not arise in this case for the charge was laid not under the flag desecration statute, which has been held to define an offense malum in se, but rather was brought under the flag alteration or improper use statute (RCW 9.86.020), defining offenses malum prohibitum, and requires no proof of evil or criminal intent or design, but only that the act was voluntarily and knowingly done. *Cf. State* v. *Turner, supra;* Desecration of the flag of the United States; penalties, 18 U.S.C. § 700 (Supp. 1972).

The object to which defendant affixed the tape symbol was an actual flag of the United States. 4 U.S.C. § 1 (1927). It conformed to the official design prescribed in 4 U.S.C. § 1 (1927), as augmented by executive orders of the President adding additional stars for additional states admitted into the Union (4 U.S.C. § 2 (1927)). It was thus a flag of the

United States within the protective provision of 4 U.S.C. §3 (1927), prohibiting the printing, painting, attaching or affixing any word, figure, mark, picture, design, drawing or advertisement upon, or displaying a flag so adorned within the District of Columbia, a statute quite similar in language to that now before us.

Defendant contends that the statute is unconstitutionally overbroad and vague, made so by RCW 9.86.010, which relates to such things as standards, colors, ensigns or shields. Although defendant might profess doubts as to what these latter devices are, there is no doubt but that the statute adequately informed him with reference to the article he used—an actual American flag. The prohibited conduct whereof defendant was charged, we think, was described in the statute and in the complaint in language sufficiently clear and concise as to be comprehended by a person of ordinary understanding.

> [A]lmost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel.

Harlan, Justice, concurring in the result in *Cole* v. *Richardson*, 397 U.S. 238, 240, 25 L. Ed. 2d 275, 90 S. Ct. 1099 (1970); *Cole* v. *Richardson*, 405 U.S. 676, 683, 31 L. Ed. 2d 593, 92 S. Ct. 1332 (1972). Defendant made no claim whatever that he did not know that the article he suspended from his apartment window was a flag of the United States. Thus, as applied to him, the charge was well laid and the statute constitutionally precise. The conduct whereof he was convicted was clearly prohibited and specifically charged.

That there are ways and means other than those charged by which the statute may be violated does not render it

vague and overbroad as to the particular conduct charged if an understanding of the conduct prohibited can be reasonably drawn from the act. In *Zicarelli* v. *New Jersey State Comm'n of Investigation*, —— U.S. ——, 32 L. Ed. 2d 234, 238, 92 S. Ct. 1670, 1674 (1972), defendant argued that the "immunity provided by the New Jersey statute is unconstitutionally vague because it immunizes a witness only against the use and derivative use of 'responsive' answers and evidence."

In holding untenable the contention of vagueness, the court, *inter alia*, said:

> This is not the technical construction of "responsive" in the legal evidentiary sense that appellant fears, but rather is a construction cast in terms of ordinary English usage and the good-faith understanding of the average man. The term "responsive" in ordinary English usage has a well-recognized meaning. It is not, as appellant argues, "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).

Defendant is in no position to conjure up hypothetical behavior which, while colorably actionable, would render the statute vague or overbroad when the particular conduct charged is clearly within the statute. One may not urge the unconstitutionality of a statute unless he has been adversely affected by the features of it which he claims are unconstitutional. *State* v. *Lundquist*, 60 Wn.2d 397, 374 P.2d 246 (1962); *State* v. *Human Relations Research Foundation*, 64 Wn.2d 262, 391 P.2d 513 (1964).

The judicial power to declare a legislative act unconstitutional should not be exercised in hypothetical cases. *United*

States v. *Raines*, 362 U.S. 17, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960); *State* v. *Dizon*, 78 Wn.2d 796, 479 P.2d 931 (1971). This principle, we think, finds new support in *Grayned* v. *City of Rockford*, —— U.S. ——, 33 L. Ed. 2d 222, 92 S. Ct. 2294, 2298 (1972), which considered an antinoise ordinance from two separate standpoints, (a) vagueness, and (b) overbreadth. That opinion held neither vague nor overbroad an ordinance which said that no person, while on or adjacent to any school grounds or building, "shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof."

A criminal statute is unconstitutionally vague when it leaves the standard of guilt to the variant views of the different courts and juries which may be called upon to enforce it. *Grayned* v. *City of Rockford, supra.* Thus, a statute making it a criminal offense to exact any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries was held unconstitutionally vague because one charged under it would not be informed of the nature and cause of the accusation (*United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 65 L. Ed. 516, 41 S. Ct. 298 (1921)); but a statute prohibiting the sale of goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor, including as it did the element of predatory intent, was held good. *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963). It is thus the rule that, if the general class of offenses to which a penal statute is directed falls plainly within its terms and can be made constitutionally definite by a reasonable construction, the statute will not be held unconstitutionally vague even though marginal cases could be conjured up where doubts of constitution-

ality would arise. *United States* v. *Spector*, 343 U.S. 169, 96 L. Ed 863, 72 S. Ct. 591 (1952). Where possible, it is the duty of the courts to give to a statute the construction which sustains its constitutionality, even though it might be susceptible of a different interpretation. *United States* v. *Rumely*, 345 U.S. 41, 97 L. Ed. 770, 73 S. Ct. 543 (1953); *State* v. *Dixon, supra,* and cases cited therein. Similarly, an oath required of all Massachusetts public employees not only to uphold and defend the constitutions, but to oppose the overthrow by force, violence, or any illegal or unconstitutional method, was held neither unconstitutionally vague, nor otherwise invalid despite the contention that the word *oppose* could conceivably be construed to demand active combat against those who would overthrow the government by force, violence, or other unconstitutional means. *Cole* v. *Richardson*, 405 U.S. 676, 31 L. Ed. 2d 593, 92 S. Ct. 1332 (1972).

Defendant also contends that the flag statute under which he was convicted is unconstitutional for overbreadth because it impairs his freedom of speech as guaranteed under the First Amendment. Placing the device on the flag, he says, was symbolic speech. When a statute impairs the right of freedom of speech prima facie, he urges, there is no presumption of its constitutionality, and the state has a heavy burden of sustaining it.

We are unable to sustain such sweeping condemnations of what appears to be a straightforward and precisely declared prohibition of placing either words, figures, marks, designs, drawings or advertisements upon a flag of the United States, or displaying such flag after this has been done to it.[1]

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[1] We think it inappropriate and fruitless to initiate an analysis of those recent cases which relate to freedom of speech, "fighting

The assertion made here of symbolic speech as a basis for sustaining the claim of unconstitutional vagueness and overbreadth is, we think, as nebulous, vague and overbroad as the statute here applied is narrow and precise. The statute does not purport to inhibit speech of any kind whether actual or symbolic, printed or auditory; it merely says that one cannot use the flag of the United States as the material upon which to print his utterance; he cannot lawfully employ the flag as a billboard, poster, or placard upon which to print his message.

Case authority upon which defendant relies, to sustain his claim of freedom of symbolic speech exercised by attaching signs or symbols upon an actual flag, are inapplicable. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943), went no farther than to hold that neither children nor their parents could be punished for refusing to salute the flag if they had bona fide religious convictions against doing so. *Stromberg* v. *California*, 283 U.S. 359, 75 L. Ed. 1117, 51 S. Ct. 532 (1931), referred to by defendant, merely held that the state could not constitutionally prohibit the display of a red flag as a

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words," and public obscenity as inaugurated in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942); *Terminiello* v. *Chicago*, 337 U.S. 1, 93 L. Ed. 1131, 69 S. Ct. 894 (1949); *Feiner* v. *New York*, 340 U.S. 315, 95 L. Ed. 295, 71 S. Ct. 303 (1951); *Cox* v. *Louisiana*, 379 U.S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453 (1965), culminating in *Cohen* v. *California*, 403 U.S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971), in which a jacket proclaiming an obvious obscenity against enforcement of the draft laws, was conspicuously worn by the accused while walking through the Los Angeles County Courthouse; the wearing was held protected by the First Amendment despite oft-repeated judicial assertions that public obscenity is not so protected, and since the words did not appear to be directed toward any person but to the conscription laws in general, they could not be held to be "fighting words."

sign of opposition to the government. It did not involve a flag of the United States, nor any defacement of it. *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969), held that students could not be precluded from wearing black arm bands as a symbol of protest against the American participation in the Vietnam war. *Street* v. *New York,* 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969), involved a charge of *desecration* of the flag by words directed against it and the burning of it. It reversed the conviction, as we understand, for the reason that the court could not ascertain from the record whether defendant had been convicted for what he *said* about the flag, or what he *did* to it. There was, moreover, no circumstance there in which it could be said that Street was using so-called "fighting words," or inciting a public disturbance, violence, or riot, or was engaged in conduct which at that time and place would be likely to do so. And finally, *Long Island Vietnam Moratorium Comm.* v. *Cahn,* 437 F.2d 344 (2d Cir. 1970), cited by defendant, does not concern an actual flag of the United States, but merely a red, white and blue circular design with the asserted peace symbol superimposed upon it.

The issue in this case, then, is not whether the legislature in enacting RCW 9.86.020 has intended to or actually curtailed or impaired the rights of this defendant to speak freely or to communicate his ideas to others, for there is nothing about the statute which would do this. As applied to him, the statute does not bar the defendant from buying, printing, marking, proclaiming, denouncing, carrying, advocating, or displaying upon any kind of material or object he chooses whatever idea he wishes to communicate to

others except upon a flag of the United States. Nor does the state contend that he can be required to pay public obeisance to the flag, or compel him to pledge allegiance to it. *See State ex rel. Bolling* v. *Superior Court*, 16 Wn.2d 373, 133 P.2d 803 (1943), holding that children whose parents were members of Jehovah's Witnesses could not be compelled to pledge allegiance in the public schools. The only interdiction of free speech so far as this case is concerned is that one cannot alter or deface a flag of the United States —and perhaps other official symbols which are not before us—as a medium of communication. The larger issue, therefore, is whether a state—or the United States—can constitutionally bar the public employment and display of a flag of the United States, the official emblem of the nation, as a backing or as background material, or as a billboard poster or placard for advertising a cause, philosophy, religion or product. We note that the statute does not bar the carrying of the American flag in connection with other banners, flags, signs, symbols or devices, but only the altering or adorning of it, or a symbol representing it, by placing foreign and extraneous materials, marks or symbols upon it. Thus, whatever impairment might be said to arise from this statute trenching upon the defendant's rights to speak his mind freely and communicate his personal views by sign and symbol is minimal—so minuscule and trifling as to come within the de minimis non curat lex rule. Defendant's freedom of speech and communication is no more impaired by this statute than would his rights to symbolic speech be abridged by an antinoise ordinance prohibiting the use of sound tracks at certain places and hours or the needless sounding of automobile horns and bells—or unnecessary noise next to a school. *Grayned* v. *City of Rockford*, —— U.S. ——, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).

The nation has a right to adopt a national emblem and the states have a right to protect it. The nation and the state have a constitutional right to declare that the flag of the United States, as a national symbol, is not available to anyone for use as a backing nor may it be altered for purposes of creating a medium for self-advertising, whether that advertising be the dissemination of one's private views on life and things in general, or of a commercial product or service. We think it beyond argument that the nation and state both have a recognizable interest in preserving the flag as a symbol of the nation and in keeping it free of extraneous adornment and alien markings and designs.

The rule contended for by defendant, that his claimed right to affix a conspicuous symbol upon the flag of the United States is an integral component of his freedom of speech, has grave portent. If this defendant had this right, if the state cannot keep the flag of the United States free of extraneous signs, markings, pictures, designs, drawings and advertisements, then, of course, that right to put them there belongs equally to everyone. Banks and finance companies could, with equal claim of right, proclaim their solvency or the insolvency of business rivals with the dollar sign overprinting the flag; cattlemen with pictures of prize animals; or canneries with facsimiles of canned goods. If defendant's view of the constitution were sound, then nearly everything offered, sold, hawked or delivered could lawfully in one way or another be advertised upon the flag of the United States, and the several states and the United States would be without power to prevent it.

And that is not the end of it: There is the realm of political, social, religious and philosophical ideas. If defendant cannot be constitutionally barred by law from affixing and displaying what he describes as a peace symbol

upon the flag of the United States, neither can he be constitutionally prevented from proclaiming the Ku-Klux Klan upon it, nor the swastika, nor the hammer and sickle, either in advocacy of the Ku-Klux Klan, or Nazism, or Communism, or in opposition to these movements. Nor could he be stopped from utilizing the flag as a medium of display for whatever religious signs or symbols of whatever religion, new or old, he might espouse or detest. In short, if the defendant were right, the state and the United States could not lawfully prevent the flag from being actually employed as a billboard, placard, or backing for advertising proclaiming anything and everything imaginable.

We think the state can constitutionally keep the flag free of extraneous symbols, pictures and signs. There are thousands of other means available to the defendant for the dissemination of his personal views, and depriving him of the flag of the United States as one of them does not in our opinion measurably impair his freedom of speech.

The constitutionality of a similar flag statute, as it applied to the picture of a flag printed on a bottle of beer, was questioned in *Halter* v. *Nebraska,* 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419 (1907). There the statute prohibited the placing of or the exhibition or display of any flag of the United States upon which had been placed any word, figure, mark, picture, design, drawing or advertisement and punished violations as a misdemeanor. In sustaining the constitutionality of the Nebraska flag statute, the court said:

> And we cannot hold that any privilege of American citizenship or that any right of personal liberty is violated by a state enactment forbidding the flag to be used as an advertisement on a bottle of beer. It is familiar law that even the privileges of citizenship

> and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good.

and, further,

> It would be going very far to say that the statute in question had no reasonable connection with the common good and was not promotive of the peace, order and well-being of the people. Before this court can hold the statute void it must say that and, in addition, adjudge that it violates rights secured by the Constitution of the United States. We cannot so say and cannot so adjudge.

Accordingly, the Court of Appeals is reversed and the cause remanded to the King County Superior Court for reinstatement of the judgment and sentence.

HALE, *C.J.*

WE CONCUR:

ROSELLINI, *J.*
HUNTER, *J.*

WRIGHT, *J.*
COCHRAN, *J. Pro Tem*

No. 42256

STAFFORD, J. (Concurring in the Result Only)—I concur in the result reached by the majority. I cannot, however, agree with the manner in which the majority has dealt with the problem of overbreadth in the area of the first amendment to the United States Constitution. The cases cited in support of the majority's position are not, for the most part, first amendment cases. Using non-first amendment cases to support a first amendment issue undermines the majority rationale. For this reason I concur in the result only.

STAFFORD, J.

I concur, HAMILTON, J.

No. 42256

FINLEY, J. (dissenting)—On May 10, 1970, thousands of young Americans felt moved to protest the U.S. invasion of Cambodia and the killings at Kent State University which had occurred a few days previously. The young man before this court joined in this expression of dissatisfaction by displaying an American flag (his own personal property) from a window of his apartment. The flag was displayed in an upside down position. A reasonable facsimile of the symbol of peace, currently well-recognized as such by most young people and also by many older people, had been superimposed on the flag by the use of adhesive black elec-

trical tape. This same peace symbol is worn as a medallion: It is embroidered or otherwise made a part of various parts of the wearing apparel of many young people, ranging from college down to high school and grammar grades. *This, as I view the circumstances, is the factual picture which emerges from this case. It is obviously significantly different from what arises from the majority's interpretation and extrapolation of the evidence.* It seems to me that this is, in essence, a case of a perhaps over-exuberant youthful advocate for peace and for ending the war in Vietnam.

His was an advocacy with which most people now rather wholeheartedly and well nigh unanimously agree. The President of the United States and his recent political opponent for the Presidency apparently agreed upon this, if nothing else. Even a majority of Congress—despite political party affiliations—I daresay are in substantial agreement. The only area of disagreement is in terms of the time and manner of ending the war and restoring peace in our time. The young man's action in displaying the flag adorned with the peace symbol in the manner indicated above might be regarded as an example of an idealistic and courageous appeal for world peace. However, he has apparently offended the sensitivities of certain more sedate citizens. In any event, *that any pernicious or baleful thing was contemplated or any evil intent actually involved is not substantiated by the evidence in this case.* And here, in essence, hangs the tale of my very respectful but nevertheless firm and substantial disagreement with the majority in this case. In other words, (a) there is, in ancient criminal law parlance, no proof of *mens rea; i.e.,* evil intent, and (b) proof of intent is, in my judgment, an essential element of the crime provided by RCW 9.86.020. Thus, as this court held in the opinion written by Hale, J., in *State*

v. *Turner,* 78 Wn.2d 276, 474 P.2d 91 (1970), the prosecution failed to prove a necessary element of the crime charged and the case simply should be dismissed on this basic and traditional ground.

It should be rather obvious that the majority's much sterner view, in construing and applying the facts of this case, leads not only to an oversimplified application of legal principles and rules, but to a grossly erroneous result. One consequence of the majority's approach, in addition to the failure to recognize the requirement that evil intent be proved, is that any objective consideration of First Amendment freedom of speech rights and concepts is brusquely swept aside, apparently simply to sustain conviction of the hapless young defendant. Contrariwise, the majority opinion of the Court of Appeals, in my best judgment, objectively construes the facts of this case, and reaches a better-reasoned, more rational disposition of this matter. In this connection, I intend to emphasize certain important considerations dealt with at considerable length in the majority opinion of the Court of Appeals by Horowitz, J., and to more fully discuss the requirement of the pertinent statute that evil intent must be proved.

The Court of Appeals objectively observed that a flag may be considered from two points of view: "(1) as a physical object, and (2) as a symbol of ideas." *State* v. *Spence,* 5 Wn. App. 752, 756, 490 P.2d 1321 (1971). In short, the view quite generally held is that "the American flag is an identifying, history-preserving and ideological symbol." 5 Wn. App. at 757. Indeed, the majority opinion itself contains more than one reference to the United States flag as a "symbol".

A symbol by its very being is expressive; so to display the American flag, if not pure expression or articulation,

is certainly a traditionally recognized and effective form of communication. *See* Note, 30 Maryland L. Rev. 332, 346 (1970). This conclusion is borne out by the determination of the U.S. Supreme Court in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 632, 87 L.Ed. 1628, 63 S.Ct. 1178 (1943) that "[s]ymbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." Indeed, the well-recognized symbol of peace, which was here attached to the American flag, is equally a form of expression when displayed. The symbolic speech which is expressed by the display of such symbols is protected by the First Amendment to the United States Constitution. *Police Department of the City of Chicago* v. *Mosley*, 408 U.S. 92, 33 L.Ed.2d 212, 92 S.Ct. 2286 (1972) (picket signs); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969) (black armbands); *Stromberg* v. *California*, 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532 (1931) (display of a red flag). *See* Note, 69 Colum. L. Rev. 1091 (1968). Consequently, one of the significant issues clearly before this court is whether the immediate statutory prohibition against affixing any design upon the flag is to take precedence over the defendant's invocation of the First Amendment protection of symbolic speech. *The majority either myopically or arbitrarily brush this issue under the rug.* The Court of Appeals did not duck the issue, but, in my judgment, evaluated it properly and determined that "a statute may protect the flag *if so to do protects the safety of the state against a clear and present danger.*" (Italics mine.) *State* v. *Spence*, *supra* at 759. In other words, the Court of Appeals held that no "clear

and present danger" existed to support the statute and its application in the instant case. 5 Wn. App. at 759. *See Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572, 86 L.Ed. 1031, 62 S.Ct. 766 (1942); *Schenck* v. *United States*, 249 U.S. 47, 63 L.Ed. 470, 39 S.Ct. 247 (1919); *State ex rel. Holcomb* v. *Armstrong*, 39 Wn.2d 860, 239 P.2d 545 (1952). In this regard, the Court of Appeals also determined that, where the demands of free speech seem to conflict with a protection of legitimate governmental interests, *such competing interests must be evaluated and balanced against each other* in order to determine whether the speech sought to be exercised will be constitutionally protected. *See United States* v. *O'Brien*, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968). But, in this regard, the majority herein rather too simplistically and also arbitrarily state that they think it is "beyond argument" that the nation and state have a "recognizable interest" in keeping the flag free of "extraneous adornment". *This is not the law as is clearly shown by the cases cited above, and certainly does not address the issue before us.* The mistaken and perhaps somewhat result-oriented conclusions of the majority seem to me to fall far short of appropriate judicial treatment and resolution of the indicated very real constitutional question presented by this case. Furthermore, by adopting this incomplete approach to the serious question regarding the extent of the competing interest in protecting freedom of speech, the majority actually completely ignores the requirement established by the U.S. Supreme Court that these conflicting interests be resolved by a *careful balancing* procedure. As stated by the Court in *Thomas* v. *Collins*, 323 U.S. 516, 529-30, 531-32, 89 L.Ed. 430, 65 S.Ct. 315 (1945), substantial weight must be given First Amendment freedoms in applying this required balancing test:

> The case confronts us again *with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins.* Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment.
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> . . .
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> . . . [I]n our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. *Schneider* v. *State,* 308 U.S. 147, 161. And the answer, under that tradition, can be affirmative, to support an intrusion upon this domain, *only if grave and impending public danger requires this.* (Italics mine.)

As to what constitutes legitimate means of securing governmental interests in competition with the First Amendment freedoms, the U.S. Supreme Court has recently stated:

> The nature of a place, "the pattern of its normal activities, dictates the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, *Brown* v. *Louisiana,* 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our

cases make clear that *in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; . . .* (Italics mine.)

Grayned v. *City of Rockford*, 408 U.S. 104, 116, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972). In applying the balancing test required, it is my judgment that the Court of Appeals correctly determined that the passive means of communication utilized by the defendant in this case, under the particular circumstances involved, certainly constituted no "clear and present" or "grave and impending danger", and, on balance, outweighed the interest of the state—no matter how "recognizable"—in keeping the flag free of "extraneous adornment". As in *Police Department of the City of Chicago* v. *Mosley*, *supra*, the defendant's silent vigil was a peaceful means of communication, not prone to violence, and therefore is protected by the First Amendment. Additionally, as noted by the Court of Appeals, where the U.S. Supreme Court has held that words critical or contemptuous of the flag are protected by the First Amendment, certainly the attachment of a symbol to the flag—an innocuous act containing no disrespect for the flag—constitutes a protected form of speech, and is to be accorded greater weight than the competing interest of the state in this matter. *See Street* v. *New York*, 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969).

The majority states as its reason for ruling that the defendant's means of expression should not receive the protection of the First Amendment that "whatever impairment might be said to arise from this statute trenching upon the defendant's rights to speak his mind freely and communicate his personal views by sign and symbol is minimal;" that "there are thousands of other means available to the

defendant for the dissemination of his personal views." It is historically undeniable that this type of reactionary, if not personally biased reasoning was the very sort that has led to and perpetuated unconstitutional deprivations of fundamental liberties in the past. In *Plessy* v. *Ferguson*, 163 U.S. 537, 41 L.Ed. 256, 16 S.Ct. 1138 (1896), the U.S. Supreme Court noted that the statute being contested there provided for equal accommodations for blacks and whites in railway coaches, and ruled essentially that, since blacks had other adequate seats on the train, no need existed to allow them to occupy seats reserved for whites. This "other means available" logic of the "separate but equal" doctrine began to crumble in *Sweatt* v. *Painter*, 339 U.S. 629, 94 L.Ed. 1114, 70 S.Ct. 848 (1950), and was finally held by the Supreme Court to afford an unconstitutional treatment of blacks in *Brown* v. *Board of Education*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954). In ruling as it did, the Court explicitly rejected the reasoning which the majority in this case advances in support of its conclusion. The fact that there may well be "other means available" is certainly no basis for depriving one of fundamental liberties, whether such freedom takes the form of choosing to sit in any seat in a train, or expressing personal views through the combined display of chosen symbols. In view of the United States Constitution's powerful protection of the freedom to speak one's mind, and almost innumerable decisions of the United States Supreme Court to this effect, it seems not only highly irregular and unnecessary but arbitrary and oppressive for the majority to hold otherwise in this case. I am therefore in agreement with the holding of the Court of Appeals that RCW 9.86.020, the improper display statute, as interpreted by the majority and applied

in this case constitutes an unconstitutional abridgment of free speech.

The majority, as indicated above, also suggests that proof of evil intent is not required in a prosecution under the immediate statute (RCW 9.86.020). I cannot agree. Although the conviction of the defendant should be reversed upon the basis that the statute violates the defendant's constitutionally-protected freedom of speech, I am firmly convinced that the trial court erred in refusing to instruct the jury that evil intent is an essential element of the offense charged. If proof of evil intent were not required, then the Court of Appeals correctly concluded that the patriotic editions of two Seattle newspapers (Seattle Post-Intelligencer, July 4, 1970 at page 1, and Seattle Times, June 14, 1970 § A, at page 1), in displaying a picture of the American flag with words and pictures over it, would be equally susceptible to criminal charges, since RCW 9.86.020 applies both to an actual flag and to a representation of the flag. RCW 9.86.010. Certainly I cannot distinguish, and I submit the majority herein cannot distinguish the defendant's actions from the pictures in the two publications simply because the patriotic message or communication of the newspapers seems to be a more preferable instance of the exercise of freedom of speech:

> But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Cohen* v. *California*, 403 U.S. 15, 24 (1971); *Street* v. *New York*, 394 U.S. 576 (1969); *New York Times* v. *Sullivan*, 376 U.S. 254, 269-270 (1964), and cases cited: *NAACP* v. *Button*, 371 U.S. 415, 445

(1963); *Wood* v. *Georgia*, 370 U.S. 375, 388-389 (1962); *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949); *DeJonge* v. *Oregon*, 299 U.S. 353, 365 (1937).

Police Department of the City of Chicago v. *Mosley*, *supra* at 95. Indeed, such a distinction need not be made. Neither the publications of the newspapers nor the conduct of the defendant herein appear to have contained the element of evil intent which is necessarily required under RCW 9.86.020. We stated in *State* v. *Turner*, *supra* at 282, in determining whether the flag desecration statute (RCW 9.86.030) required proof of intent for conviction, that if such proof of evil design or purpose were not necessary, "the legislature could readily have said otherwise." It is therefore significant here that the legislature has also been silent regarding the element of intent in the crime of improper display of the flag (RCW 9.86.020). Certainly proof of evil intent must be necessary here as well. This conclusion is further supported by the very pertinent, applicable, and decisively phrased language of Justice Hale in setting forth the holding of the court in *State* v. *Turner*, *supra* at 283:

> Accordingly, unless the statute expressly eliminates the element of intent or design or defines the kinds of offenses which, by their very nature, are classified judicially as mala prohibita, the ingredients of intent, design and purpose *should be deemed indispensable* to a proof of guilt. (Italics mine.)

Actually, the reasoning of the court and the decision in *Turner* are absolutely inconsistent with the reasoning and result reached by the majority in the instant case. Furthermore, try as I may, I can find no reasonably convincing

justification for the inconsistency. In the instant case, the jury should have been instructed and should have considered and decided whether evil intent was present in the alleged violation of RCW 9.86.020, *i.e.,* whether the defendant intended, for example, to provoke a public disturbance, disorder, breach of the peace, or a riot. The task for the jury in determining the subjective intent of the defendant, is facilitated by such objective manifestations as the character of the design upon the flag, the manner of display, the circumstances of time and place, and the activities which accompanied such display. Unless the element of evil intent be proved *beyond a reasonable doubt,* no conviction under RCW 9.86.020 can be sustained.

Finally, in rejecting the defendant's overbreadth argument, the majority has confused and misapplied the distinct constitutional doctrines of "vagueness" and "overbreadth". This distinction was most recently recognized by this court in *State* v. *Oven,* 78 Wn.2d 909, 480 P.2d 766 (1971). "Vagueness" is found where the legislation fails to provide fair notice to the public of that which is being prohibited by the law. *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 31 L.Ed.2d 110, 92 S.Ct. 839 (1972); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967); *Edwards* v. *South Carolina,* 372 U.S. 229, 9 L.Ed. 2d 697, 83 S.Ct. 680 (1962); *Seattle* v. *Drew,* 70 Wn.2d 405, 423 P.2d 522 (1967). It is an element of due process which demands precision in penal legislation. *NAACP* v. *Button,* 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963). On the other hand, the "overbreadth" doctrine applies where the penal legislation prohibits not only unprotected behavior, but embraces within its scope some constitutionally protected activity, even though the language of the statute may

be sufficiently precise as not to be deemed "vague". *United States* v. *Robel,* 389 U.S. 258, 19 L.Ed.2d 508, 88 S.Ct. 419 (1967); *Freedman* v. *Maryland,* 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965); *Aptheker* v. *Secretary of State,* 378 U.S. 500, 12 L.Ed.2d 992, 84 S.Ct. 1659 (1964); *Shelton* v. *Tucker,* 364 U.S. 479, 5 L.Ed.2d 231, 81 S.Ct. 247 (1960); *Adams* v. *Hinkle,* 51 Wn.2d 763, 322 P.2d 844 (1958). In some cases the legislation may suffer from both infirmities by containing imprecise language (vagueness) and by prohibiting a constitutionally protected activity (overbreadth). *See Cox* v. *Louisiana,* 379 U.S. 536, 13 L.Ed.2d 471, 85 S.Ct. 453 (1964); *Winters* v. *New York,* 333 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665 (1948); *Seattle* v. *Drew, supra.*

Because of the majority's confusion of these two doctrines, it repeatedly rejects the defendant's overbreadth argument by asserting that RCW 9.86.020 is sufficiently precise (and therefore not *vague*) as applied to the defendant. In ruling upon this basis that the defendant may not raise the overbreadth issue in this case, the majority opinion states:

> Defendant is in no position to conjure up hypothetical behavior which, while colorably actionable, would render the statute vague or overbroad when the particular conduct charged is clearly within the statute. One may not urge the unconstitutionality of a statute unless he has been adversely affected by the features of it which he claims are unconstitutional.

In support of this pronouncement the majority cites authority which involved *neither the overbreadth doctrine nor the First Amendment, but rather which dealt with problems of "standing" under circumstances which are irrelevant*

to the immediate issue. In addition, the above statement of the majority, made in the context of a First Amendment case in which overbreadth of a statute is asserted, simply and directly contradicts the settled law of the land. In *NAACP* v. *Button, supra* at 432-33, the U.S. Supreme Court ruled as follows:

> [I]n appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill* v. *Alabama,* 310 U.S. 88, 97-98; *Winters* v. *New York, supra,* at 518-520. Cf. *Staub* v. *City of Baxley,* 355 U.S. 313. . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchallenged delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. *Marcus* v. *Search Warrant,* 367 U.S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.

Accord: Aptheker v. *Secretary of State, supra.* It is our duty, therefore, to consider that which *may* be proscribed by the statute, not simply the application of the statute to the facts of the case before us. The majority's use of non-First Amendment *vagueness* cases to rebut the defendant's First Amendment *overbreadth* challenge is both in error and improper. The "chilling effect" upon the exercise of protected freedoms of expression is the evil which the

overbreadth doctrine strives to eradicate. *Dombrowski* v. *Pfister,* 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965). The proper application of the doctrine in the case before us would provide a review of the statute under all possible circumstances, thereby insuring that the exercise of protected rights will not be deterred for either the defendant or the remainder of the public.

In this same area of overbreadth, the majority also rejects the defendant's challenge on the basis that "it is the duty of the courts to give to a statute the construction which sustains its constitutionality." *The error of this conclusion is evident from our own past decisions.* In *Adams* v. *Hinkle, supra* at 769, we held that "there is no presumption of constitutionality of statutes abridging those rights [of freedom of speech or press]." *Accord: Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 96 L.Ed. 1098, 72 S.Ct. 777 (1952). Thus the majority has again cited inappropriate authority for an erroneous conclusion with the unfortunate result that the challenge of the defendant has indeed fallen upon deaf ears.

Since the rulings of both the United States and Washington Supreme Courts require that we examine the merits of the immediate challenge of this statute's overbreadth, and that we do so without affording the statute any presumption of constitutionality, it is evident that the majority's sweeping and mistaken generalities have produced a curious anomaly in the constitutional law of this state. The fact that an "actual flag" was used in the instant case seems quite irrelevant since RCW 9.86.020 does not restrict its prohibition against affixing designs to an "actual flag". Indeed, the term "flag", as used in the immediate penal statute, is defined in RCW 9.86.010 as follows:

> The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, *or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag,* standard, color, ensign or shield of the United States or of this state, *or a copy, picture or representation thereof.* (Italics mine.)

With this statutory definition in mind, the issue is whether the state has a compelling and overriding interest in prohibiting the public from affixing a design to a "picture or representation" of the flag, "made of any substance . . . evidently purporting to be . . . a copy, picture or representation" of the flag. Not only does RCW 9.86.020 require punishment for the two newspaper publications referred to earlier, it would equally demand punishment for a grammar school child's drawing of the flag which contained any patriotic slogan or other extraneous marking thereon. Thus, regardless of any personal feelings concerning the activities of the defendant before this court, it is evident that this statute goes too far. Its "chilling effect" is far-reaching. In proscribing innocent activities, the statute is overbroad, and in this respect is constitutionally inappropriate. Under these circumstances, I can find no solace in inapplicable case authority for the majority's proposition that this court may excuse one form of statutorily-prohibited conduct in *State* v. *Turner, supra,* and cavalierly condemn another as in the instant case. Since RCW 9.86.020 proscribes constitutionally protected conduct as to which no compelling state interest has been demonstrated, the

statute is overbroad on its face and therefore unconstitutional.

For the reasons stated, I would affirm the decision of the Court of Appeals to reverse the conviction of the defendant in this case.

FINLEY, J.

Order Denying Petition for Rehearing

IN THE

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Appellant,

vs.

HAROLD OMAND SPENCE,

Respondent.

The Court having considered the respondent's petition for rehearing herein,

It is ordered that the petition be and it is hereby denied.

Dated this 13th day of March, 1973.

By the Court:

Chief Justice

81 Wn.2d 788

Notice of Appeal Filed With the Supreme Court of Washington

IN THE

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 42256

HAROLD OMAND SPENCE,

Appellant,

vs.

THE STATE OF WASHINGTON,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Harold Omand Spence appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Washington reversing the decision of the Court of Appeals and remanding the cause to the King County Superior Court for reinstatement of the judgment and sentence. The decision of the Supreme Court of the State of Washington was filed on January 18, 1973 and a petition for rehearing was denied in an order entered on March 13, 1973.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

PETER GREENFIELD
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I, CHRISTOPHER T. BAYLEY, Prosecuting Attorney for King County, Washington, hereby acknowledge receipt of a copy of the foregoing notice of appeal to the Supreme Court of the United States this 9th day of April, 1973.

CHRISTOPHER T. BAYLEY

FILED COPY

No. 72-1690

FILED

SEP 10 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1690

HAROLD OMAND SPENCE,

Appellant,

v.

THE STATE OF WASHINGTON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

CHRISTOPHER T. BAYLEY
King County Prosecuting Attorney

King County Courthouse
Seattle, Washington 98104

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Washington on the ground that the constitutional question sought to be reviewed is so unsubstantial as to not need further argument.

I
THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the constitutionality of Revised Code of Washington 9.86.020.

This statute provides that no person shall for exhibition or display place "any word, figure, mark, picture, figure, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield" of the United States or the State of Washington or publically expose "any such flag, standard, color, ensign or shield" upon which "such word, figure, mark, picture, design, drawing or advertisement" appears. RCW 9.86.020.

B. The Proceedings Below

On May 10, 1970, the Appellant displayed an American flag outside his apartment window in Seattle upon which he had attached a "peace symbol." The flag, bearing this marking, was seen by three Seattle police officers who arrested the Appellant. Appellant was charged and subsequently convicted of violating RCW 9.86.020 in the Seattle District Court. He was again convicted in the Superior Court of the State of Washington for King County, in a trial de novo.

Appellant appealed his conviction to the Court of Appeals of the State of Washington contending that (1) RCW 9.86.020 violates the First Amendment to the United States Constitution and Article I, Section 5 of the Washington State Constitution and that (2) the statute is unconstitutionally vague and overbroad. That court reversed the trial court (2-1), holding that the challenged statute is unconstitutionally overbroad. *State v. Spence*, 5 Wn. App. 752, 490 P.2d 1321 (1971). The State of Washington appealed to the Washington Supreme Court. In an en banc decision, the Supreme Court reversed the decision of the Court of Appeals and remanded the case for reinstatement of the judgment and sentence, thereby upholding the constitutionality of RCW 9.86.020. *State v. Spence*, 81 Wn.2d 788, 506 P.2d 293 (1973).

II

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

Appellant contends that RCW 9.86.020 substantially curtails his First Amendment rights of free speech and political expression. To publically display an American flag to which one has affixed a peace symbol cannot be deemed traditional speech. Rather, Appellant contends that his action constitutes symbolic speech for he allegedly displayed the altered flag to protest United States involvement in Southeast Asia.

This Court recognized in *United States v. O'Brien*, 391 U.S. 367, **20 L. Ed. 2d 672**, (1968), 88 S. Ct. 1673, that merely because one intends his action as a political protest does not mean that the action becomes constitutionally protected symbolic speech. This Court said at page 376:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea . . . .

Assuming Spence's action can be deemed symbolic speech, a constitutional balance must be applied to determine whether the activity merits protection. In this case the state's historical interest in preserving the sanctity of the flag and preventing public disorder must be weighed against any resulting infringement to Spence's rights. The Court articulated this test in *O'Brien, supra.*, at 376-377:

> This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . .
>
> . . . we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. . . .

Applying the *O'Brien* standards to the present case, the display of an American flag bearing a peace symbol is not constitutionally protected symbolic speech. First, this Court decided in

Halter v. Nebraska, 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419 (1907) that a state possesses the constitutional power to prevent the misuse of the American flag. Second, CW 9.86.020 furthers an important governmental interest by preventing breaches of the peace which might be generated through misuse, and by safeguarding our national emblem from exploitation, *Halter v. Nebraska, supra., Joyce v. United States*, 454 F.2d 971 (1971, at App. D.C.); and *People v. Radich*, 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970) aff'd by an equally divided court, 400 U.S. 864, 28 L. Ed. 2d 287, 91 S. Ct. 1217 (1971). Third, this governmental interest in protecting the physical integrity of the flag, is unrelated to the suppression of free expression or political protest.

Most importantly, any incidental restriction on the alleged First Amendment freedoms is no greater than is essential to protect and safeguard the flag. RCW 9.86.020 did not drastically restrict Appellant's right to protest the Cambodian incursion; innumerable other lawful means of expression remained available.

Appellant finally contends that RCW 9.86.020 poses additional dangers to First Amendment rights by proscribing various uses of the flag without making intent to misuse an element of the crime. This

argument assumes that the challenged statute regulates speech or communication; instead, it advances the state's legitimate interest in protecting the flag by defining action which is *mala prohibita*. As such, the intent of one misusing the flag is irrelevant.

In his jurisdictional statement (p. 7, fn. 3) Appellant suggests that this case could be conveniently joined with *Goguen v. Smith*, 471 F.2d 88 (1st Cir. 1972), prob. juris. noted, 41 U.S. Law Week 3616 (No. 72-1254 March 21, 1973) and *Long Island Vietnam Moratorium Committee v. Cahn*, 437 F.2d 344 (2nd Cir. 1970) jur. statement filed, 39 U.S. Law Week 3438 (No. 70-1507, March 24, 1971).

In *Goguen*, the Court of Appeals reversed a conviction under a Massachusetts flag desecration statute prohibiting contemptuous treatment of the flag. The Court held that the Massachusetts statute is impermissibly vague because what one man intends as political expression may be construed by another as contemptuous treatment of the flag. Obviously such a consideration raises fundamental First Amendment questions. RCW 9.86.020, on the other hand, requires only a determination of whether any "word, figure, mark ..." was placed upon a flag of the United States or the State of Washington. Such an inquiry does not raise

the threshold First Amendment questions posed by the Massachusetts statute. The statutes are thus clearly distinguishable and the cases ill suited for joinder.

Appellant concedes that the present case more closely resembles *Long Island, supra*, which challenges a New York State flag "use" statute similar to RCW 9.86.020. Appellant's brief, however, fails to indicate that this Court denied certiorari in *Long Island Vietnam Moratorium Committee v. Cahn*, cert. denied, 400 U.S. 956, 91, 27 L. Ed. 2d 264, 91 S. Ct. 353 (1970), despite the fact that *Long Island* posed the issue of constitutional overbreath more clearly than the present case. In *Long Island* defendants argued that the New York flag statute was overbroad because it failed to notify them that their flag representation was prohibited. In fact the three judge federal court and the Court of Appeals differed as to whether the Moratorium Committee's emblem fell within the purview of the flag misuse statute. In *Spence* there can be no doubt that RCW 9.86.020 prohibits attaching any symbol to he flag of the United States.

III

CONCLUSION

Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves this Court to dismiss this appeal, or in the alternative to affirm the judgment entered in the cause by the Supreme Court of the State of Washington.

Respectfully submitted,

CHRISTOPHER T. BAYLEY
Prosecuting Attorney
Counsel for Appellee

FILE COPY

Supreme Court, U. S.
FILED

NOV 23 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1690

HAROLD OMAND SPENCE,

Appellant,

—v.—

THE STATE OF WASHINGTON,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1690

HAROLD OMAND SPENCE,

Appellant,

—v.—

THE STATE OF WASHINGTON,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF FOR APPELLANT

Opinions Below

The opinions of the Supreme Court of Washington are reported at 81 Wn.2d 788, 506 P.2d 293 (1973), and are set forth in the appendix (A. 45-79).* The opinions of the Court of Appeals are reported at 5 Wn. App. 752, 490 P.2d 1321 (1971), and are set forth in the appendix (A. 21-44).

* "A" references are to the printed Appendix herein.

Jurisdiction

The judgment of the Supreme Court of Washington was filed on January 18, 1973. Appellant's timely petition for rehearing was denied on March 13, 1973, and his notice of appeal was filed in the Supreme Court of Washington on April 10, 1973 (A. 80). This appeal was docketed on June 11, 1973, and probable jurisdiction was noted on October 9, 1973. Appellate jurisdiction is conferred by 28 U.S.C. §1257(2).

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, §1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Revised Code of Washington §9.86.010 (1919):

"Flag," etc., defined. The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

Revised Code of Washington §9.86.020 (1919):

Improper use of flag prohibited. No person shall, in any manner, for exhibition or display:

(1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or

(2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement; . . .

Questions Presented

1. Whether the State of Washington, consistent with the First and Fourteenth Amendments to the Constitution of the United States, may punish Appellant for displaying an American flag with a peace symbol on it under the circumstances of this case.

2. Whether Revised Code of Washington §9.86.020 is impermissibly overbroad or vague in violation of the First and Fourteenth Amendments to the Constitution of the United States.

Statement of the Case

On May 10, 1970 the Appellant, Harold Omand Spence, displayed an American flag, upon which was superimposed a peace symbol constructed of removable tape, outside the window of his apartment in Seattle, Washington (A. 6; 48). The display was observed by three Seattle police officers who arrested the Appellant and seized the flag.

The Appellant was subsequently charged with improper use of the flag under Revised Code of Washington §9.86.020 (2) in a criminal complaint alleging as follows:

> He, the said Harold O. Spence, in the county of King, state of Washington, on or about the 10th day of May, 1970, willfully, unlawfully and knowingly for exhibition and display, did expose to public view a flag of the United States upon which there was then and there attached and affixed a mark, picture design or drawing, to-wit: a large black circle with connecting straight lines within.

The case was tried to a jury in the King County Superior Court.[1] The three arresting officers testified that they had observed the flag displayed from the Appellant's window with what they identified as a peace symbol on it. They entered the apartment building and were met by the Appellant who, referring to the flag, volunteered, "I didn't know there was anything wrong with it. I will take it down" (A. 6).

The Appellant testified that he had displayed the flag with a peace symbol on it, and had done so for the purpose of associating the American flag with peace in protest of the recent invasion of Cambodia and of the deaths at Kent State University. He explained that he had chosen masking tape so that the peace symbol could be removed without damage to the flag (A. 6-7).

The Appellant was found guilty after trial and given a suspended sentence of ten days in jail and a fine of seventy-five dollars plus court costs (A. 7).

The Court of Appeals reversed the conviction in a 2-1 decision which held the statute under which the Appellant was charged unconstitutionally overbroad (A. 21-44).

The Washington Supreme Court in turn reversed the decision of the Court of Appeals in a 6-1 decision. In characterizing the First Amendment issue before them, Justice Hale, writing for himself and three others, observed:

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[1] The case was appealed to the Superior Court from a conviction in the Seattle District Court. The latter is not a court of record and the trial in Superior Court was a trial *de novo*.

> The only interdiction of free speech so far as this case is concerned is that one cannot alter or deface a flag of the United States . . . as a medium of communication. 81 Wn.2d at 798-99 (A. 59).

With respect to the Appellant's interest in the speech activity at issue, the majority stated:

> whatever impairment might be said to arise from this statute trenching upon the defendant's rights to speak his mind freely and communicate his personal views by sign and symbol is minimal . . . (A. 59).

And with respect to the state's interest invoked to justify restriction of Appellant's fundamental right:

> We think it beyond argument that the nation and state both have a recognizable interest in preserving the flag as a symbol of the nation and in keeping it free of extraneous adornment and alien markings and designs (A. 60).

The majority rejected Appellant's overbreadth challenge, holding that Appellant lacked standing to attack, on the ground of overbreadth, a statute which the court found unobjectionable as applied to him (A. 53-55). Two justices concurred in the result but took issue with the majority's treatment of the overbreadth issue on the ground that "[u]sing nonfirst amendment cases to support a first amendment issue undermines the majority rationale" (A. 63).

One justice dissented on the grounds that Appellant's activity was protected under the First Amendment, that the statute under which he was convicted was unconstitutionally overbroad on its face and that in any event a

conviction could not be upheld without proof of evil intent (A. 63).

Summary of the Argument

The activity for which Appellant was prosecuted, though it involved communication by visual symbols rather than by spoken words, was expression entitled to protection under the First Amendment. *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969); *Stromberg* v. *California,* 283 U.S. 359 (1931). As expression, it was subject to restriction "only to prevent grave and immediate danger to interests which the state may lawfully protect." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 639 (1943).

Preservation of the peace, the interest tendered by the state, is not sufficiently jeopardized by the kind of activity in which Appellant was engaged to warrant interference with his freedom of expression. Cf. *Street* v. *New York,* 394 U.S. 576 (1969). Moreover, a "heckler's veto" should not be permitted to restrict expression otherwise entitled to First Amendment protection. E.g., *Terminiello* v. *Chicago,* 377 U.S. 1 (1949). Preservation of an orthodoxy of expression reflecting "proper respect for our national emblem" is not an interest which a state may lawfully protect. *Street* v. *New York, supra; West Virginia State Board of Education* v. *Barnette, supra.*

Washington's improper flag use statute is fatally overbroad as demonstrated by its application to the facts of this case and to a myriad of other examples of unquestionably protected expression which are made punishable by its terms. The statute is so broad that it cannot be taken literally, cf. *Long Island Vietnam Moratorium Committee* v. *Cahn,* 437 F.2d 344 (2d Cir. 1970), *juris. statement filed,* 39

U.S.L.W. 3438 (No. 70-1507, March 24, 1971), and it is, therefore, vague. Its reach is unnecessarily extended by the absence of any requirement of proof of criminal intent.

ARGUMENT

I.

Appellant's use of the American flag as an aid in the dissemination of ideas is protected by the First Amendment.

A. *The First Amendment's Protection Encompasses Visual Symbols as Well as Spoken Words.*

The First Amendment's protection extends beyond spoken words, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Brown* v. *Louisiana*, 383 U.S. 131 (1966); *Stromberg* v. *California*, 283 U.S. 359 (1931), and the fact that visual symbols (such as words, gestures or flags) rather than audible language are one's medium of expression is not of itself constitutionally significant. It is when some component of the medium "sufficiently impinges on some valid state interest" (*Tinker, supra* at 515 [White, J., concurring]) that the boundaries of protected speech are encountered. And, of course, such boundaries exist for the spoken word as well as for the visual display. *E.g., Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (overamplified loudspeakers).

In reviewing attempts to regulate expression in its various forms, this Court has considered the medium of expression at issue in each instance in light of the environment in which it was used. It has not infrequently found that, under the relevant circumstances, visual communication was pro-

tected where audible expression could have been proscribed, *e.g., Tinker, supra* (black armbands in a public school); *Brown* v. *Louisiana, supra* (silent vigil in a public library), or that spoken words were properly punished where silent expression might have been immune, *e.g., Grayned* v. *City of Rockford,* 408 U.S. 104 (1972) (noise near a public school). This is not to suggest that so-called "symbolic speech" is, as a general rule, afforded more (or less) protection than so-called "pure speech."[2] It is, rather, to suggest that any medium of expression must be considered in light of the circumstances in which it is employed. Whenever a state seeks to regulate expression it is necessary to identify precisely the nature of the state's interest in regulation and to determine whether such interest is "unrelated to the suppression of free expression"; whether such interest is "sufficiently important" to justify the curtailment of free expression; and whether the proposed curtailment is "no greater than is essential to the furtherance of that interest". *United States* v. *O'Brien,* 391 U.S. 367, 376, 377 (1968). *See generally,* Nimmer, *The Meaning of Symbolic Speech under the First Amendment,* 21 U.C.L.A. L. Rev. 29 (1973).

B. *Appellant's Expression Was Presumptively Entitled to Protection . . .*

Appellant's display of an American flag with a peace symbol on it in May of 1970 expressed a protest of the invasion of Cambodia and the deaths at Kent State University (A. 6). This instance of expression was presumptively

[2] Alluding, in a slightly different context, to the category of "pure speech," Professor Kalven has observed that "all speech is necessarily 'speech plus.' If it is oral, it is noise and may interrupt someone else; if it is written, it may be litter." *The Concept of the Public Forum,* 1965 Sup. Ct. Rev. 1, 23.

entitled to protection under the First and Fourteenth Amendments, for it is "the usual rule that governmental bodies may not prescribe the form or content of individual expression," *Cohen* v. *California*, 403 U.S. 15, 24 (1971), and "the State has a heavy burden to demonstrate that [the proscription under review] presents . . . an exceptional case," *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 504 (1952). Appellant submits that his is no exceptional case. On the contrary, his quiet expression of an aspiration for peace constituted an exercise of the freedom of speech in its "most pristine and classic form."[3] *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963); *Stromberg* v. *California*, *supra*. Furthermore, his medium was one which has been hallowed by tradition: use of the flag with slogans or with portraits of political candidates superimposed on it has for generations been part of our culture. Referring to such uses of the flag, Chief Judge Lumbard concluded:

> The use of the American flag throughout our history and in almost every political campaign as an aid in the dissemination of ideas demonstrates beyond any doubt the protected nature of such forms of expression. *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2nd Cir. 1970), *juris. statement filed*, 39 U.S.L.W. 3438 (No. 70-1507, March 24, 1971).

C. . . . *and the State Has Failed to Overcome the Presumption.*

While "only a compelling state interest . . . can justify limiting First Amendment freedoms," *NAACP* v. *Button*, 371 U.S. 415, 438 (1963), Appellant submits that Washington's punishment of his peaceful speech activity is not only

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[3] This is not to imply that his message was necessarily soothing or uncontroversial. E.g., *Terminiello* v. *Chicago*, 377 U.S. 1 (1949).

unnecessary to the promotion of a compelling state interest, it cannot be justified by reference to any legitimate governmental interest whatsoever—that is, by reference to any interest "unrelated to the suppression of free expression." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). Since the state has the burden of demonstrating the contrary, it is appropriate to look first to the interest which it has tendered.[4]

1. Preservation of the peace

In its brief below (at p. 9) the state commented without elaboration:

> The legitimate state interest is, of course, preservation of the peace.

While preservation of the peace is, clearly, a legitimate state concern, that concern can never justify curtailment of expression which poses no threat to the peace. *Cohen* v. *California, supra* at 20. There is nothing in the record of this case to suggest that a disturbance was likely. On the contrary, the quiet, unobtrusive display from Mr. Spence's window was observed only, so far as the record discloses, by three policemen, and there is no indication that they were in any way disconcerted. We have only the state's "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of speech." *Tinker, supra* at 508.

The state apparently views the statute under which Appellant was prosecuted as creating a conclusive presump-

[4] In reviewing state regulation restricting fundamental rights, the Court may limit its examination to interests tendered by the state. See, e.g., *Dunn* v. *Blumstein*, 405 U.S. 330 (1972).

tion that the display of a flag with a peace symbol (or other marking) poses an imminent threat to the peace regardless of the context.[8] In effect, it would establish a heckler's veto without the need for a heckler. But this Court has rejected the notion of a heckler's veto. *See, e.g., Bachellar* v. *Maryland*, 397 U.S. 564 (1970); *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

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[8] Even where the curtailment of expression is not at issue, a criminal statutory presumption must fall unless it can be said with assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. *Leary* v. *United States*, 395 U.S. 6, 32-36 (1969); *Tot* v. *United States*, 319 U.S. 463 (1943). Appellant suspects that the likelihood of a breach of the peace resulting from the display of a flag with a peace symbol on it from the window of an apartment in Seattle, Washington approaches zero. Consider how many of the recently reported cases dealing with "improper" use or even desecration of the flag actually involved some breach of the peace—there are none so far as Appellant is aware.

A review of the flag cases currently pending before this Court reveals that none involve a danger of an actual breach of the peace. *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2nd Cir. 1970), juris. statement filed, 39 U.S.L.W. 3438 (No. 70-1507, March 24, 1971) (Peace symbol on flag—no evidence of breach of peace); *Goguen* v. *Smith*, 471 F.2d 88 (1st Cir. 1972), prob. jur. noted, 41 U.S.L.W. 3616 (No. 72-1254, May 21, 1973) (flag patch on buttocks—no evidence of breach of peace); *Thoms* v. *Heffernan*, 473 F.2d 478 (2nd Cir. 1973), pet. for cert. filed, 41 U.S.L.W. 3555 (No. 72-1359, April 9, 1973) (peace symbol on flag—no evidence of breach of peace); *Sutherland* v. *Illinois*, —— Ill. —— (1973), juris. statement filed, 42 U.S.L.W. 3122 (No. 73-380, Aug. 29, 1973) (flag burning—no evidence of breach of peace); *Farrell* v. *Iowa*, 209 N.W.2d 103 (1973); juris. statement filed, 42 U.S.L.W. 3201 (No. 73-574, Sept. 27, 1973) (flag burning—no evidence of breach of peace). Moreover, the flag cases which have been decided by this Court reveal no danger of a breach of the peace. E.g., *Street* v. *New York*, 394 U.S. 576 (1969) (flag burning—no evidence of breach of peace); *Radich* v. *New York*, 401 U.S. 531 (1971) (obscene use of flag—no evidence of breach of peace). Indeed, in the numerous instances in which flag statutes have been invoked to punish expression, counsel are aware of no case in which actual evidence of a danger of a breach of the peace has been adduced.

In *Street* v. *New York*, 394 U.S. 576 (1969), Mr. Justice Harlan enumerated four interests which under the circumstances of that case did *not* justify the prohibition of speech critical or even contemptuous of the flag:

> (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passersby who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem. *Id.* at 591.

Yet, despite the fact that the facts of the instant case are even milder than *Street* these are the very interests to which the state alludes in defense of its curtailment of Appellant's freedom of expression.*

Referring to the quoted passage from *Street*, Judge Horowitz, writing for the Washington Court of Appeals in this case observed:

> If such interests are insufficient with respect to *words* . . . critical or contemptuous of the flag, they would clearly be insufficient as to *symbols* used conveying the

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* Appellant's expression can hardly be compared to the "fighting words" at issue in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). Appellant's message was not "directed to the person of [any] hearer." *Cantwell* v. *Connecticut*, 310 U.S. 296, 309 (1940). No individual actually present could reasonably have regarded Appellant's display as a direct personal insult.

> same meaning as the words themselves; and a fortiori they would be insufficient as to symbols respectful of the flag and involving no physical destruction of any part thereof, the flag in conjunction with the peace symbol being used to passively communicate a constitutionally protected message. 5 Wn. App. at 761 (A. 33).

Washington's curtailment of Appellant's freedom of expression cannot be justified, given the facts of this case, by reference to the state's interest in preserving the peace.

2. Promotion of respect for the flag

Significantly, the Washington Supreme Court did not even mention "preservation of the peace" as a basis for sustaining the curtailment of Appellant's activity. It did, however, find a

> recognizable interest in preserving the flag as a symbol of the nation and in keeping it free of extraneous adornment .... 81 Wn. 2d at 799 (A. 60).

In explaining its conclusion, the court below offered three observations: (1) Appellant might express his views by other means; (2) if Appellant's expression were protected, then there could be no restriction of use of the flag for commercial advertising purposes; and (3) if Appellant's expression were protected, then the flag could be used to communicate obnoxious political, social, religious and philosophical ideas. *Ibid.*

The "other means available" rationale was rejected by this Court in *Schneider* v. *State*, 308 U.S. 147, 163 (1939):

> one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

See also, *Cohen* v. *California*, 403 U.S. 15 (1971).

The concern over commercial exploitation of the flag presupposes that the boundaries of protected expression for commercial advertising purposes are coextensive with those of protected political speech, a view which this Court has not taken. *See, e.g., Valentine* v. *Chrestensen*, 316 U.S. 52 (1942).[7]

And finally, the court's concern that the flag might be used to convey various obnoxious "political, social, religious and philosophical ideas" (81 Wn.2d at 800 (A. 60)) and its reasoning that, consequently, the flag may not be used "as a medium of communication" (81 Wn.2d at 799 (A. 59)) points plainly to a content-oriented regulation of expression at odds with the First Amendment. Cf. *Schacht* v. *United States*, 398 U.S. 58, 63 (1970). The court below was clearly contemplating regulation *not* "unrelated to the suppression of free expression" (*United States* v. *O'Brien*, 391 U.S. 367, 377 [1968]) when it observed:

> If defendant cannot be constitutionally barred from affixing and displaying what he describes as a peace symbol upon the flag of the United States, neither can he be constitutionally prevented from proclaiming the Ku-Klux Klan upon it, nor the swastika, nor the ham-

[7] This Court upheld a restriction on commercial use of the flag in *Halter* v. *Nebraska*, 205 U.S. 34 (1907). However, no First Amendment issues were considered since it was not until 1925 that the First Amendment was held applicable to the states in *Gitlow* v. *New York*, 268 U.S. 652 (1925).

> mer and sickle, either in advocacy of the Ku-Klux Klan, or Nazism, or Communism, or in opposition to these movements.[8] 81 Wn.2d at 800 (A. 60-61).

Appellant recognizes that freedom of speech may entail exposure from time to time to distasteful ideas or ideologies. However, as Mr. Justice Harlan stated in *Street* v. *New York*, 394 U.S. 576, 592 (1969):

> It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.[9]

Nor may expression be curtailed for the purpose of requiring citizens to show "proper respect for our national emblem." *Id.* at 591.

Our flag, though we may cherish it, is after all only a symbol (or to those uninitiated in the language, a piece of

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[8] The concern implicit in this observation is manifestly futile since, as the court acknowledges, "the statute does not bar the carrying of the American flag in connection with other banners, flags, signs, symbols or devices" (81 Wn.2d at 799 [A. 59]) so long as the symbols are not actually combined. Is it less distressing to conceive of the American flag and a swastika-imprinted banner flying side by side than to conceive of the symbols combined?

[9] This proposition and Appellant's conviction in this case cannot be reconciled. Appellant's plight was well characterized by Justice Finley, dissenting in the Washington Supreme Court, as follows:

> The young man's action in displaying the flag adorned with the peace symbol . . . might be regarded as an example of an idealistic and courageous appeal for world peace. However, he has apparently offended the sensitivities of certain more sedate citizens. 81 Wn.2d at 802-3 (A. 64).

many-colored cloth).[10] To force Appellant to render ritualistic obeisance to it by requiring him to observe a series of taboos concerning its use or display is to raise it to the secular equivalent of a religious icon in violation of the First Amendment. *Cf. West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943), where enforcement of a compulsory flag salute rule was rejected on First Amendment grounds and in which Mr. Justice Jackson observed:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matter of opinion. . . . *Id.* at 642.

Suppression of obnoxious ideas, even where their expression involves use of the American flag, is not a legitimate interest of a government limited by the First Amendment.

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[10] It is a disquieting paradox that the flag which to so many symbolizes a mature tradition of freedom of speech should itself be unavailable for uninhibited use as a "medium of communication." 81 Wn.2d at 799 (A. 59).

II.

Section 9.86.020 of Washington's Revised Code is unconstitutional on its face a) because constitutionally protected activity may be swept within its ambit, b) because it fails to provide officials with adequate standards for enforcement and c) because, as construed by the Washington Supreme Court, it is so vague and imprecise as to fail to apprise the public of the scope of its proscriptions.

Even if one assumes that Washington may constitutionally impose some degree of regulation upon the use and display of the American flag, this Court has required that provisions impinging upon areas protected by the First Amendment must be drawn with sufficient narrowness and precision to insure that First Amendment freedoms retain the "breathing space" necessary for robust survival. E.g. Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844 (1970); Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. of Pa. Law Rev. 67 (1960); *Broadrick* v. *Oklahoma,* —— U.S. ——, 37 L. Ed.2d 830 (1973).

A. *Washington's Statute Is Overbroad Because Protected First Amendment Activity May Be Swept Within Its Ambit.*

This Court has ruled that a statute which purports to outlaw protected First Amendment activity is unconstitutional on its face, despite the fact that the statute may also purport to proscribe activity not entitled to First Amendment protection. E.g., *Broadrick* v. *Oklahoma, supra; Herndon* v. *Lowry,* 301 U.S. 253, 258 (1937); *Shelton*

v. *Tucker*, 364 U.S. 479 (1960); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Cohen* v. *California*, 403 U.S. 15 (1971); *Keyshian* v. *Board of Regents*, 385 U.S. 589 (1967); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Plummer* v. *Columbus*, —— U.S. ——, 42 U.S.L.W. 3222 (Oct. 16, 1973).

In *Broadrick*, Mr. Justice White articulated the rationale underlying the First Amendment overbreadth doctrine when he stated:

> "It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.
>
> • • • • •
>
> Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." 37 L. Ed.2d at 839-840.

Thus, whether or not Appellant's innocuous expression is entitled to First Amendment protection,[11] Washington's statute cannot survive constitutional scrutiny if its proscriptions are so broadly drawn as to justify a "judicial prediction or assumption" that third persons will refrain from protected activity as a consequence of Section 9.86.020 of Washington's Revised Code.

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[11] Appellant, of course, vigorously asserts that his expression is protected by the First Amendment. See *infra*, pp. 8-17.

The Washington statute, as it has been broadly construed by Washington's Supreme Court, purports to outlaw the traditional use of the American flag as an effective aid in the dissemination of ideas. In ruling the virtually identical New York statute unconstitutionally overbroad, [then] Chief Judge Lumbard stated:

> "The use of the American flag throughout our history and in almost every political campaign as an aid in the dissemination of ideas demonstrates beyond doubt the protected nature of such forms of expression. *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2d Cir. 1970), juris. statement filed, 39 U.S. L.W. 3438 (No. 70-1507, March 24, 1971).

Since no state may purport to outlaw the time-honored practice of invoking the flag in a manner similar to that described by Judge Lumbard, Washington's statute, unless invalidated, will impose a pervasive and continuous restraint on First Amendment activity and is, therefore, unconstitutionally overbroad.

B. *Washington's Statute Fails to Afford Adequate Standards for Enforcement and Administration*

As Mr. Justice White noted in *Broadrick*, a second policy underlying the First Amendment overbreadth doctrine is a concern that no penal statute, especially in the First Amendment area, may vest a local functionary with "standardless" discretion to determine whether or not a given form of expression falls within its proscription. It is, of course, a truism to observe that any such overbroad statute is a licensing provision, permitting only that expression tolerated by local officials to flourish.

In *Cox* v. *Louisiana*, 379 U.S. 536 (1965), this Court, in declaring a broadly worded breach of the peace statute unconstitutional, stated:

> [t]he lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. 379 U.S. at 557.

In *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), a broad anti-picketing ordinance was invalidated because:

> The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. 310 U.S. at 97-98.

See also, *Kunz* v. *New York*, 340 U.S. 290 (1951); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958); *Coates* v. *Cincinnati*, 402 U.S. 611 (1971).

The recent history of the nation's flag statutes bear witness both to the wisdom of the *Cox-Thornhill-Coates* rule and to the capacity for abuse inherent in Washington's overbroad statute.

Despite the public and notorious commercial exploitation of the flag, counsel are aware of no recent attempt to invoke statutes similar to Washington's against any commercial exploiter.

Despite the widespread use of the American flag by groups supporting recent American policy in Southeast Asia, counsel are aware of no attempts to invoke flag laws against such groups.

Despite the systematic use of American flags in connection with election campaigns, counsel are aware of no attempt to invoke flag laws against any candidate.

In fact, the only persons against whom flag laws similar to Washington's have been invoked, have been persons who have earned the enmity of local functionaries by espousing dissenting political opinions or adopting non-conformist modes of dress.

The fact is that flag laws such as Washington's, because of their overbreadth and lack of precision, have been utilized by local officials as general warrants to punish dissenting or non-conforming behavior.[12]

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[12] A representative samplying of prosecutions brought under New York's identical statute prior to its demise in *Long Island Vietnam Moratorium Committee, supra*, exposes the capacity for abuse inherent in Washington's statute:

1) In Claverack, New York, a young man was arrested for driving a red, white and blue Volkswagen (he also had a brown beard). *People* v. *Pregaskis*, currently pending before the Justice of the Peace of Claverack, New York.

2) In Happauge, New York, a young housewife was arrested and held on $500 bond for flying her American flag upside down outside her home to protest the war in Vietnam. *People* v. *Hubner* (Nassau District Court).

3) In New York City, approximately sixty persons have been arrested for displaying a peace symbol on a flag on their automobile windows.

4) In *People* v. *Place, et al.*, four actors associated with the Yale Drama School were arrested in New York City for using the flag as a theatrical prop in a play critical of contemporary Ameri-

C. Washington's Statute Fails to Afford Notice of the Scope of Its Proscription

In attempting to construe the virtually identical New York statute, Chief Judge Lumbard found the statutory language so broad that it could not be read literally, leaving its meaning unascertainable. *Long Island Vietnam Moratorium Committee* v. *Cahn, supra,* at 350. The net result of such a statute is to force persons wishing to engage in protected activity to gamble that their reading of the statute will be in accord with the reading of the local police. This Court, however, has consistently invalidated penal statutes which inadequately apprise the public of the scope of their proscription. E.g. *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939).

The uncertainty inherent in the Washington statute is particularly disturbing because, when rights under the First Amendment are at issue, this Court has demanded precise delineation of the duties of a citizen. E.g. *Smith* v. *California,* 361 U.S. 147 (1959); *Saia* v. *New York,* 334 U.S. 558 (1948).

The reach of Washington's improper flag use statute is further broadened by virtue of the fact that, as construed by the Washington Supreme Court, it "requires no proof of evil or criminal intent or design . . . ." 81 Wn.2d at 793 (A. 52). This means that the statute gratuitously punishes conduct which reflects no disrespect for the flag (as-

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ean values. The charges were ultimately dismissed on motion of the District Attorney.

5) In *People* v. *Leyva,* a New York bookseller was arrested for selling a poster headed "Because We Care!," signed by luminaries of the anti-war movement, consisting of an American flag in which the stars were replaced by peace symbols.

suming that the statute is designed to punish such disrespect);[13] it means also that the statute punishes activity engaged in without knowledge of any circumstances which would tend to create a public disorder (assuming that the statute is designed to guarantee preservation of the peace).[14] This approach to either legislative objective flies in the face of this Court's mandate that legislation restricting presumptively protected activity be narrowly drawn:

> Statutes affecting constitutional rights must be drawn with "precision," *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *United States* v. *Robel*, 389 U.S. 258, 265 (1967), and must be "tailored" to serve their legitimate objectives. *Shapiro* v. *Thompson*, [394 U.S. 618, 631 (1969)]. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less restrictive means." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972).

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[13] By contrast, under Washington's flag desecration statute, Revised Code of Washington §9.86.030, "intent to desecrate . . . must be established." *State* v. *Spence*, *supra* at 792 (A. 52). See *State* v. *Turner*, 78 Wn.2d 276, 474 P.2d 91 (1970).

[14] The nature and extent of this Court's emphasis on intentionality in relation to anti-breach-of-the-peace regulations impinging on presumptively protected activity is illustrated by the language of Mr. Justice Harlan in *Cohen* v. *California*:

> we [do not] have here an instance of the exercise of the State's police power to prevent a speaker from *intentionally* provoking a given group to hostile reaction. [Citations omitted.] There is . . . no showing that anyone who saw Cohen was in fact violently aroused or that appellant *intended* such a result. 403 U.S. at 20. [Emphasis supplied.]

One less restrictive approach to the regulation of flag use would be a statute incorporating a well-defined element of criminal intent.

A requirement of *mens rea* is the rule, rather than the exception, in criminal law. See *Smith* v. *California*, 361 U.S. 147, 150 (1959); *Dennis* v. *United States*, 341 U.S. 494, 500 (1951). And while this Court has not articulated a general doctrine regarding *mens rea*, see *Powell* v. *Texas*, 392 U.S. 514, 535 (1968), it has relied heavily on notions of intentionality and malice in narrowing the regulation of presumptively protected activity. For example, in *Scales* v. *United States*, 367 U.S. 203 (1961), the Court ruled that in order to convict an individual under the membership clause of the Smith Act, a showing of active participation in the organization with knowledge of, and specific intent to bring about, its illegal objectives was necessary. See also *Yates* v. *United States*, 354 U.S. 298 (1957); *Dennis* v. *United States*, *supra*; *Watkins* v. *United States*, 354 U.S. 178 (1957); cf. *Wieman* v. *Updegraff*, 344 U.S. 183 (1952).

In *Smith* v. *California*, *supra*, this Court invalidated an ordinance which would have imposed criminal liabilty on a bookseller for possession or sale of obscene material without requiring proof of his knowledge of the *contents* of the materials. See also *Mishkin* v. *New York*, 383 U.S. 502 (1966).

Similarly, the imposition of civil sanctions for a defamatory attack on a public official has been constitutionally limited by requiring proof of "actual malice," *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964), and a similar rule has been used to narrow statutes imposing criminal sanctions for libelous remarks. See *Garrison* v.

Louisiana, 379 U.S. 64 (1964); cf. *Ashton* v. *Kentucky*, 384 U.S. 195 (1966) (common law of criminal libel). See generally *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 882-91 (1970).

If the state of Washington has a legitimate concern in regard to use of the American flag, any such concern could be adequately addressed by a narrowly drawn statute which employed a well-defined element of criminal intent as a limiting principle.

D. *Appellant Has Standing to Invoke the Overbreadth Doctrine*

In refusing to declare Washington's flag statute unconstitutionally overbroad, a majority of the Washington Supreme Court erroneously ruled that Appellant lacked standing to argue overbreadth, since Washington's statute was constitutional as applied to his communicative activity [A. 53-55].[15] However, as this Court noted in *Broadrick*, the very essence of the First Amendment overbreadth doctrine is a relaxation of traditional standing rules to permit the invalidation of a statute which acts as a restraint upon protected expression. Since the circumstances warrant a "judicial prediction or assumption" that Washington's statute will "cause others not before the Court to refrain from constitutionally protected speech or expression," appellant unquestionably possesses standing to urge that the statute be declared invalid on its face.[16]

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[15] Of course, appellant vigorously denies that his communication could be constitutionally proscribed. See, *infra*, pp. 8-17.

[16] Appellant assumes that the articulation in *Broadrick* of a "substantial" overbreadth requirement in certain situations was designed merely to allow the Court to make discerning "judicial

CONCLUSION

The judgment of the Washington Supreme Court should be reversed.

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prediction" as to the danger which a particular statute poses to the robust exercise of protected speech. *Broadrick* v. *Oklahoma*, *supra*, 37 L.Ed.2d at 842, n. 14. Where, as here, the impact of Washington's statute on protected expression is obvious and pervasive, whether or not one phrases the test as overbreadth or substantial overbreadth, it is clearly satisfied.

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-1690

HAROLD OMAN SPENCE

Appellant

v.

STATE OF WASHINGTON

Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF THE RESPONDENT

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SUMMARY OF THE ARGUMENT

Symbolic speech like pure speech is protected by the First Amendment. *Tinker v. Des Moines Independent School District,* 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969). However neither free speech nor symbolic speech is an absolute right. *United States v. O'Brien,* 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). Both may be curtailed by governmental regulation without affecting constitutional guarantees if (1) the regulation furthers an important governmental interest, (2) the gov-

ernmental interest is unrelated to the suppression to free expression, and (3) the incidental restrictions on alleged First Amendment freedoms are no greater than is essential to the furtherance of that interest. *United States v. O'Brien, supra* at 377. Under this standard Washington State statute RCW 9.86.020 is constitutional.

ARGUMENT

I.

ARGUMENT IN RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR NO. I.

The freedom to express ideas, even unpopular ones, is an important cornerstone of our democracy. The right to unfettered expression embodied in the First Amendment encompasses symbolic speech as well as the spoken word. *Tinker v. Des Moines, supra.* Respondent acknowledges that laws which would encroach upon these fundamental rights must be regarded with suspicion. Laws which seek to control ideas and attitudes are a greater threat to personal liberties than foreign enemies.

On April 30, 1970, the United States after years of warfare in Viet Nam sent American troops into the sovereign territory of Cambodia. Emotions ran high in America; the Viet Nam war was still a topic of sincere and often bitter debate. In American Universities, traditionally a citadel of free debate, feelings were extremely high. On May 4, 1970, students at Kent State University in Ohio joined other students across the country in exercising their constitutional rights to assemble and to petition for a redress of grievances. Unfortunately at Kent State, the high level of feelings led to a tragedy.

National Guard troops called onto the campus to maintain order fired upon the students killing four of them.

Harold Oman Spence, a full-blooded American Indian and a student at Seattle Community College was one of many millions of Americans who felt compelled to express himself about the war in Viet Nam and the killings at Kent State. He took his own American flag and attached to it a peace symbol made of black electrical tape. He then placed this flag upon a staff and displayed it to public view in the central area of Seattle. A bystander saw this flag and became upset. He called the police who arrested Mr. Spence for violation of RCW 9.86.020.

On the witness stand Mr. Spence told the jury that he did not know that it was unlawful to publicly display an altered American flag. Further he said:

> I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought that America stood for peace.

Respondent, the State of Washington, can think of no ideal more worthy of protection than Mr. Spence's belief that "America stands for peace." But the equities of this particular fact pattern must be set aside to fairly evaluate the question before this court.

Acknowledging that symbolic speech falls within the protection of the First Amendment, the question then becomes: "Can a state, in exercising its responsibility to maintain public peace and to promote the general welfare, prohibit certain forms

of conduct having First Amendment overtones, when such prohibition is not intended to promote or restrict any particular idea, philosophy or expression?"

The answer to the question, as phrased, is yes. Freedom of speech is not a license. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942). In *Chaplinsky* this court said:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech that prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite in immediate breach of the peace.

571-572.

This same limitation on the spoken word applies equally to symbolic speech. In *United States v. O'Brien, supra,* at 377, this court observed:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea. However even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring it into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. The court has held that when speech and nonspeech elements are combined in the same course of conduct a sufficiently important governmental in-

terest in regulating the nonspeech element can justify incidental limitations on the First Amendment freedoms.

The state of Washington submits that the constitutionality of RCW 9.86.020 must be affirmed under the test enunciated in *O'Brien, supra.*

RCW 9.86.020 provides:

> No person shall in any manner, for exhibition or display:
>
> . . .
>
> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement; . . . .

Under this statute, to prove a violation, the state must establish three elements: (1) An actual American flag must be involved; (2) The flag must have been altered by attaching any figure, mark, picture, design, drawing or advertisement; and, (3) the altered flag must then be displayed to public view. In essence the statute forbids the public display of an altered American flag.

As such the statute clearly meets the *O'Brien* standard. Respondent has at all times and in all courts urged that the only and sole legitimate state interest protected by RCW 9.86.020 is the public peace. The preservation of order is clearly related to an important and substantial governmental function—and this interest is acknowledged by the appellant. The appellant, however, would minimize the attention which the respondent has given to this interest as follows: "The legitimate state interest

is, of course, the preservation of the peace." (App. Brief, p. 11.)

Respondent concedes that the Washington State Supreme Court decision at 81 Wn.2d 788 (1972) did not turn on the issue of the preservation of peace. Rather the Supreme Court of the State of Washington found a legitimate state interest in "preserving the flag as a symbol of the nation and in keeping it free from extraneous adornment" at 799. Respondent did not advocate this basis for sustaining the statute. Respondent will not now abandon the position announced by the Washington State Supreme Court but it will not actively argue it either. Instead, the state interest which respondent urges this court to consider is the state interest in protecting the peace.

As this court has clearly recognized certain words are fighting words, *Chaplinsky v. New Hampshire, supra,* it does not stretch the imagination to suggest that certain symbols are fighting symbols. Many of the most powerful human experiences have symbols around which people gather. The icons of Eastern Orthodox christianity, the consecrated hosts of Catholicism and the sacred torah of Judaism are all symbols to which people attach strong feelings. There would no doubt be strong and probably violent reactions by people with strong religious identifications should someone decide that these religious symbols would make an effective vehicle for the symbolical expression of one's opposition to a belief in God. Parading a host covered with excrements or the torah dripping with pig's blood before a public audience may be an effective means of communication but it surely would also be a fighting symbol. A statute which forbade the public display

of these high intensity religious symbols so as to preserve the public peace, and which did not seek to control one's religious beliefs, would satisfy the constitutional safeguards of *O'Brien*.

Additionally, should Congress decide that the proscription of any public display of an altered flag of a foreign nation within sight of a foreign border or ministry would reduce provocations which might cause international incidents—then such a law would satisfy the requirements of *O'Brien*.

All the courts which have ever dealt with flag display statutes have acknowledged the high level of feelings held by many people about their own flag. "Hence, the flag is both an appeal for loyalty to existing America, its policies and its ideals, and an invitation for peaceful change to bring America closer to hearts desire. In short, the American flag is an identifying, history preserving and ideological symbol." *State v. Spence,* 55 Wn. App. 752 (1971).

Recognizing the highly symbolic purpose of the flag this court has also recognized the fighting nature of insults to the flag. "Insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." *Halter v. Nebraska,* 205 U.S. 34 at 41, 51 L. Ed. 696, 27 S. Ct. 434 (1907). That additions and alterations to the American flag have been recognized as fighting symbols is recognized in *People v. Radich,* 308 N.Y.S.2d 846 (1970) affirmed by an evenly divided court without opinion 39 U.S.L.W. 4338 (March 24, 1971). In *Radich* the Court of Appeals of New York, relying upon *Halter* and *O'Brien* noted that there was a sufficient governmental interest being protected by the statute—the public peace. The court

held that a New York statute similar to RCW 9.68.020 expressed "a clear legislative purpose to prevent the breach of the peace." 308 N.Y.S.2d 849 (1970).

While many events of near history, such as the rise of Naziism in Germany, may have tempered unbridled nationalistic feelings, nevertheless, millions of Americans still have a strong attachment to their flag. In recognition of the existence of this strong emotion among many citizens of the State of Washington, and not in an attempt to limit the freedom of expression or enforce feelings of respect for the flag, the legislature forbad the public display of an altered flag. The legislative judgment that the flag is not a proper vehicle for conveying any idea, be it peace, brotherhood, world unity, gay liberation, equality of sexes, racial integration, racial segregation, Christianity, Naziism, Communism, Pan-Arabism, love or hate is only a recognition that such conduct may be as much a fighting symbol as Chaplinsky's words.

Of course, it is not enough that the statute merely reflect a legitimate state interest. It must also be an interest which is unrelated to the suppression of free expression. RCW 9.68.020 is narrowly drawn and is unrelated to the suppression of any free expression. The statute is not intended to promote or punish ideas or attitudes about the flag. The statute without exception proscribes all displays of altered American flags. The statute creates no favored exceptions like those the court found unacceptable in *Police Department v. Mosley,* 408 U.S. 92, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972) or *Grainad v. The City of Rockford,* 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972). Had the Washington

legislature excepted flag display by major political parties or for expressing certain ideas, then the statute would not be constitutional. But the prohibition is nondiscriminatory and thus within the ruling of *O'Brien*.

Finally to meet the *O'Brien* test, the statute must only incidentally restrict one's freedom of expression. RCW 9.68.020 does not in any way restrict what a person may say or think about the American flag or American public policy. Spence was not convicted for criticizing government actions in Cambodia and at Kent State. His protest could have taken innumerable other forms which would not have threatened the preservation of the peace. Thus any restriction on the freedom of speech resulting from RCW 9.68.020 is limited and incidental as the statute does not prohibit any type of thought.

The Washington State Supreme Court recognized that any restriction is most incidental:

> The issue in this case then is not whether the legislature in enacting 9.86.020 has intended to or actually curtailed or impaired the rights of this defendant to speak freely or to communicate his ideas to others, for there is nothing about the statute which would do this. As applied to him, the statute does not bar the defendant from buying, printing, marking, proclaiming, pronouncing, carrying, advocating, or displaying any kind of material or object he chooses what ever idea he wishes to communicate to others except upon a flag of the United States. Nor does the state contend that he can be required to pay public obeisance to the flag or compel him to pledge allegiance to it. . . .The only interdiction of free speech so far as this case is concerned is that one cannot alter or deface a flag of the United States—and perhaps other official symbols, which are not be-

fore us—as a medium of communication. *State v. Spence, supra,* at 798.

Respondent therefore submits that the legitimate state interest required by *O'Brien* is present and that that interest is in preserving the public peace; that this interest has been acknowledged in *People v. Radich, supra, Halter v. Nebraska, and Chaplinsky v. New Hampshire, supra;* that the statutory restriction is unrelated to an expression of free speech; and, that the statutory restriction is nothing more than an incidental restriction on First Amendment freedoms.

II.

ARGUMENT IN RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR NO. II.

Appellant asserts that RCW 9.86.020 is unconstitutional because (a) constitutional activity may be swept within its ambit, (b) because it fails to provide officials with adequate standards of enforcement and (c) because, as construed by the Washington Supreme Court, it is vague and imprecise.

The appellant, for the sake of argument, assumes in assignment of error No. II that Washington may constitutionally impose some degree of regulation upon the use and display of the American flag. Granting this assumption, the appellant then asserts that the statute is otherwise defective because the statute sweeps within its ambit constitutionally protected activities.

This argument was rebutted earlier where it was demonstrated that the statute falls within the *O'Brien* requirement that curtailments of symbolic speech be limited.

As authoritatively construed by the Washington Supreme Court, RCW 9.86.020 is extremely limited.

> The only interdiction of free speech so far as this case is concerned is that one cannot alter or deface a flag of the United States—and perhaps other official symbols which are not before us—as a medium of communication.

81 Wn.2d 788 at 798.

The law of Washington concerning statutory construction is the same as the federal rule set forth in *Griffin v. Brekenridge,* 403 U.S. 88, 29 L. Ed. 2d 338, 91 S. Ct. 1790 (1971). The rule in Washington is:

> An act of the legislature is not unconstitutional in its entirety because one or more of its provisions is unconstitutional unless the invalid provisions are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes.

State v. Anderson, 81 Wn.2d 234, 236 (1972).

The appellant relies heavily upon *Long Island Moratorium Committee v. Cahn,* 437 F.2d 344 (2nd Cir. 1970). But *Long Island* does not apply to an actual American flag. It applies to a peace emblem. This is a distinction which was important to both the three-judge federal court and the court of appeals.

The three-judge federal court found that the statute in question in that case applied only to the *actual* American flag (emphasis added) and not to the emblem of the appellant. The three-judge court found that the statute *was constitutional as applied to the American flag itself,* and did not apply to the

appellant's emblem. (Emphasis added.) The court of appeals found that the statute in question there did apply to appellant's emblem and was unconstitutional as applied *to the emblem* (emphasis added).

But the Washington court has already noted that the portion of the statute dealing with the actual flag is a severable portion of the statute. As pointed out above, although the contrary was urged by the appellant in that court, the Washington court noted that those portions of the statute, dealing with symbols other than the actual American flag, "are not before us" 81 Wn.2d at 799. There could be no clearer statement that the judgment of the court there was that the various portions of the statute are severable.

Therefore, since the Washington court has interpreted the statutory provisions to be severable, the appellant may not attack other parts of the statute under which he is not charged. Thus, if it is assumed that the statute is constitutional as applied to the actual flag, this assignment of error must fall since the statute, as authoritatively construed by the Washington court applies only to actual American flags.

The appellant also asserts that the statute fails to afford adequate standards for enforcement. As construed by the Washington court, there is no room for discretion in law enforcement agencies. The prohibition of RCW 9.86.020 is absolute and non-discriminatory.

> The only interdiction of free speech so far as this case is concerned is that one cannot alter or deface a flag of the United States . . . .

81 Wn.2d at 798.

The appellant would urge this court, however, to

believe that the statute is arbitrarily administered in the state of Washington. The appellant asserts the widespread use of altered American flags in Washington. There is, however, no showing made at all which would substantiate the appellant's position. As far as the respondent is aware, and certainly as far as a showing in the record, there is no abuse of this statute in the state of Washington. The statute is precise and nondiscriminatory and any defects which may exist, exist only with enforcement agencies and do not inhere in the statute.

Thirdly, the appellant asserts that the statute fails to afford notice of the scope of its proscription. The statute, of course, is precise. It clearly delineates what is proscribed conduct. What is clearly proscribed is the public display of an altered American flag. This was clearly held by the Washington court.

> Defendant contends that the statute is unconstitutionally overbroad and vague, made so by RCW 9.86.010, which relates to such things as standards, colors, ensigns or shields. Although defendant might profess doubts as to what these latter devices are, there is no doubt but that the statute adequately informed him with reference to the article he used—an actual American flag. The prohibited conduct whereof defendant was charged, we think, was described in the statute and in the complaint in language sufficiently clear and concise as to be comprehended by a person of ordinary understanding.
>
> > [A]lmost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel.
>
> Harlan, Justice, concurring in the result in *Cole v. Richardson*, 397 U.S. 238, 240, 25 L. Ed. 2d 275, 90 S. Ct. 1099 (1970); *Cole v. Richardson*, 405 U.S. 676, 683, 31 L. Ed. 2d 593, 92 S. Ct.

> 1332 (1972). Defendant made no claim whatever that he did not know that the article he suspended from his apartment window was a flag of the United States. Thus, as applied to him, the charge was well laid and the statute constitutionally precise. The conduct whereof he was convicted was clearly prohibited and specifically charged.

81 W.D.2d at 793, 794.

However, the appellant's brief does not put forth the traditional argument that the statute is unconstitutional because of vagueness. Instead, the appellant urges that the statute is unconstitutional because it does not require a showing of *mens rea*.

This is a novel approach to the question of vagueness and the respondent is not sure of the logic involved. However, it should be noted that this position is precisely the reverse of the position which the appellant urged below. There the appellant urged that the trial court had erred in failing to instruct the jury that RCW 9.86.020 required proof of a *mens rea*. Now the appellant urges that the statute is unconstitutional because it does not contain an element of *mens rea*.

According to the appellant: "This means that the statute gratuitously punishes conduct which reflects no disrespect for the flag." This assertion by the appellant prompts a number of observations. First, the statute is not designed to gratuitously punish anyone; it merely proscribes certain types of conduct. Had the statutory purpose been to punish conduct or attitudes rather than to control and promote the public peace then Mr. Spence would probably have received a substantial jail sentence rather than the $75 fine which was imposed.

Secondly the position appellant argues is uncon-

stitutional. Appellant contends that the state statute would be proper if it were so drawn as to prohibit disrespect for the flag. But such a statute, *i.e.*, that it is a crime to show disrespect for the flag would violate the constitutional mandate of *Street v. New York*, 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969) In *Street* this court indicated that a state interest in assuring that people show proper respect for the national emblem is not a sufficient state interest to justify curtailment of free speech. Any statute which attempts to control attitudes or ideas about the flag is unconstitutional. RCW 9.86.020 is constitutional precisely because it does not attempt to require proper respect for our national emblem.

Relying upon this court's historical policy that it will not consider questions raised for the first time on appeal *Duignan v. United States*, 274 U.S. 195, 71 L. Ed. 996, 47 S. Ct. 566 (1926); *Young v. Masci*, 289 U.S. 253, 77 L. Ed. 1158, 53 S. Ct. 599 (1932) the appellee will demur to the alleged error urged by the appellant with the observation that it is the responsibility of the legislature to determine the elements of a crime and it is the responsibility of the courts to pass upon the draftsmanship of the legislature. In terms of protecting freedom of speech, narrowly drawn statutes which are *mala prohibita* provide greater protection for that freedom than do statutes which attempt to control speaker's intent.

Finally, the appellant urges that the Washington court erred in finding that the defendant did not have standing to attack those parts of RCW 9.86.020 which he was not charged with.

The general rule concerning standing is set out in

United States v. Raines, 362 U.S. 17, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960) wherein the Supreme Court said

> In the exercise of that jurisdiction it is bound by two rules to which it has rigidly adhered, one, never to anticipate the question of constitutional law in advance of the necessity of deciding it; and the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

362 U.S. at 21. To this rule the court has formulated an exception in areas of the First Amendment. The exception is stated in *Thornhill v. Alabama,* 310 U.S. 88, 84 L. Ed. 1093, 60 S. Ct. 736 (1940). The exception to the rule is that one charged with a violation of a statute may attack the statute without regard to his own conduct.

> Proof of an abuse of power in a particular case has never been deemed a requisite for an attack on the constitutionality of a statute purporting to license a dissemination of ideas.

310 U.S. at 97. The rule and the exception were affirmed in *Dombrowski v. Tfister,* 380 U.S. 479, 14 L. Ed 2d 22, 85 S. Ct. 1116 (1965).

> For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.

380 U.S. at 486.

However, it is also clear that while a person may attack an overbroad statute which is applied to his own conduct, he may not attack a different part of a statute under which he is not being prosecuted.

And, as pointed out above, the Washington court

has held that that portion of the statute which charges the defendant with misusing an actual flag is severable. Consequently, even assuming that RCW 9.86.020 may have unconstitutional sections, nevertheless, following the rule laid out in *Griffin, supra,* the appellant does not have standing to attack other severable portions of the statute.

CONCLUSION

RCW 9.86.020 is a narrowly and precisely drawn statute which limits conduct only in preserving the public peace. It is not overbroad nor vague. It is constitutional.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1690

HAROLD OMAND SPENCE,

Appellant,

—v.—

THE STATE OF WASHINGTON,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR APPELLANT

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IN THE

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OCTOBER TERM, 1973

No. 72-1690

HAROLD OMAND SPENCE,

Appellant,

—v.—

THE STATE OF WASHINGTON,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

Motion for Leave to File Supplemental Brief Pursuant to Rule 41(5)

Appellant, pursuant to Rule 41(5), respectfully moves for leave to file the attached Supplemental Brief consisting of an unreported recent decision by the United States District Court for the District of New Hampshire, dated December 6, 1973, of which counsel was not aware prior to the argument herein.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1973

No. 72-1690

Harold Omand Spence,

Appellant,

—v.—

The State of Washington,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPPLEMENTAL BRIEF

On December 6, 1973, Judge Bowne invalidated a New Hampshire flag statute identical to the Washington statute at issue herein. *Cline* v. *Rockingham County Superior Court*, —— F. Supp. —— (D.N.H. Dec. 6, 1973). A copy of Judge Bownes' decision is attached hereto.

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Opinion of Hon. Hugh H. Bownes, U.S.D.J.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 73-135

JAMES A. CLINE

v.

ROCKINGHAM COUNTY SUPERIOR COURT,
EXETER, NEW HAMPSHIRE

This petition for writ of habeas corpus involves First Amendment overbreadth and vagueness challenges to New Hampshire's flag desecration statute. The statute, NH RSA 573:2, reads in pertinent part:

> No person shall . . . annex or affix . . . to any . . . flag . . . any inscription, design, devise, symbol, name, advertisement, words, marks, or notice whatever, or exhibit or display . . . any such flag . . . .

The facts have been stipulated:

1. On July 29, 1970 at 6:35 p.m., James A. Cline was arrested at Hampton Beach, New Hampshire, by Officer Donald McNutt, Jr., of the Hampton Police Department, who observed him with a blanket draped over his shoulder. The blanket had an American flag attached to it upon which a peace symbol had been penned in ink. (Tr. p. 5)

2. On September 10, 1970, a complaint was brought against the defendant in the Hampton District Court charging that the defendant did:

> "Affix a symbol to a flag of the United States of America to wit: did display a flag of the United States of America when said flag had a peace symbol drawn on said flag and did cause this said flag to be displayed in public." (Reserved Case p. 2)

3. Petitioner pled "not guilty." He was found guilty after trial by the Court and sentenced to pay a fifty dollar fine.

4. Petitioner appealed for a trial *de novo* in the Rockingham County Superior Court.

5. On October 6, 1971, the date of trial at Rockingham County Superior Court, petitioner filed a motion to dismiss on the ground that RSA 573:2 was void for vagueness and in violation of the First Amendment. On the same date, the Court denied the motion.

6. On October 6, 1971, petitioner was found guilty after trial by jury and was sentenced to pay a fine of twenty-five dollars and was also sentenced to the House of Correction for a period of three days. Sentence was stayed pending appeal to the New Hampshire Supreme Court.

7. On November 1, 1971, petitioner filed a motion to vacate sentence on the ground that the imposition of a greater sentence than that imposed in the District Court violated the defendant's constitutional right to appeal. The motion was denied on November 4, 1971.

8. On May 31, 1973, the New Hampshire Supreme Court upheld the constitutionality of RSA 573:2 and overruled petitioner's exceptions.

9. On June 7, 1973, the Rockingham County Superior Court granted a stay of execution of his sentence pending disposition of proceedings in the United States District Court for the District of New Hampshire.

10. When Officer McNutt arrested the petitioner, the latter did not show any contempt towards the flag. (Tr. p. 14)

11. At the time of the arrest, the petitioner complied with the officer's directions (Tr. p. 15) and was a civil young man. (Tr. p. 14)

12. The sole reason for the arrest was that the petitioner had a peace symbol on a flag. (Tr. p. 15)

13. At the time of the County Court trial, the petitioner was living in Nashua, New Hampshire, with his parents. (Tr. p. 16) He was a senior at the Wilton High School and was captain of the cross-country track team. (Tr. p. 16) He was eighteen years of age (Tr. p. 16) and was starting to work at the drop-in center in Nashua with youths who had drug problems or other kinds of personal problems. (Tr. p. 17)

14. Following his arrest and having been advised of his *Miranda* rights (Tr. p. 5), petitioner admitted to Officer McNutt that he had drawn the peace symbol on the flag with ballpoint ink. (Tr. p. 6)

15. Petitioner testified that he put the peace symbol on the flag "As a protest against war, the war in Vietnam, personally." (Tr. p. 17)

16. Petitioner was of draft age, was registered for the draft (Tr. p. 18), and was "against any war and specifically against the war in Vietnam." (Tr. p. 17)

17. Petitioner testified that his intent in placing the peace symbol on the flag "was to symbolize peace and American justice." "To symbolize—you know—to put together a symbol for peace; a symbol for America as a protest for the Vietnam war." (Tr. p. 18)

18. Petitioner also testified that "I respect the flag as a symbol standing for the United States." (Tr. p. 18)

19. Petitioner further testified that he did not intend to mutilate the flag (Tr. p. 18), that if he had wanted to he probably would have burned it (Tr. p. 18-19), and that he never had the intention of holding the flag up to contempt. (Tr. p. 19)

20. Petitioner testified that he was vaguely aware that putting the symbol on the flag was against the law. (Tr. p. 19)

21. Officer McNutt testified that he had encountered other young people at Hampton Beach with flags and symbols on their attire. He had seen some "wearing just the American flag and some with flags that really weren't American flags—they had the peace symbol where the stars and blue background is." (Tr. p. 8)

The Law

After the decision of the New Hampshire Supreme Court upholding the statute and his conviction; petitioner filed a writ of habeas corpus claiming

> that he was illegally arrested and convicted in violation of his rights under the First and Fourteenth Amendments to the United States Constitution in that RSA 573:2 is unconstitutional on its face and as applied to him, because it violates the right to freedom of speech guaranteed by the First Amendment to the United States Constitution and it violates the right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution in that it is overly broad, impermissibly vague and incapable of air [sic] and reasonable interpretation by public officials.

Jurisdiction rests on 28 U.S.C. §§2241 and 2254.[1]

Petitioner challenges NH RSA 573:2 as unconstitutional because it impermissibly interferes with his First Amendment freedom of speech. He maintains that the New Hampshire statute is both overvague and overbroad. However, since I rule that the statute is overbroad, it will not be necessary to consider the vagueness challenge.

The First Circuit, in *Goguen* v. *Smith*, 471 F.2d 88 (1st Cir. 1972), *cert. granted* and *oral argument heard*, 42 L.W. 3303 (Nov. 20, 1973), has recently set forth guidelines to be followed in this type of overbreadth challenge.

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[1] Although petitioner has remained at large pending the outcome of this action, he is "in custody" within the meaning of the federal habeas corpus statute. *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973).

> In the context of a federal habeas corpus proceeding a state criminal statute should not be ruled unconstitutional on its face as overbroad unless (1) the area affected by it includes a large proportion of First Amendment activities, (2) it possesses the potential for a substantial number of impermissible applications, and (3) immediate and effective excision of the statute's impermissible applications is not foreseeable without continued interruptions of First Amendment freedoms. *Goguen* v. *Smith, supra,* 471 F.2d at 98.

My first inquiry then is "whether this flag desecration law affects an area of interests which includes a substantial proportion of First Amendment activities." *Goguen, supra,* 471 F.2d at 98. The state maintains that the petitioner was not attempting to communicate any ideas by his conduct and that if he was trying to express himself, his ideas were so "nebulous, ambiguous, and not susceptible to general understanding" that they are not entitled to First Amendment protection. State's Brief at 6-8. On the other hand, petitioner's testimony demonstrates that he intended his action to symbolize "a protest against war, the war in Vietnam" and "peace and American justice." Transcript at 17-18.

It is too late now to deny "that the flag has a meaning--a very special meaning." *Goguen, supra,* 471 F.2d at 99. "Throughout our history as a nation the flag has been our symbol . . . ." *Joyce* v. *United States,* 454 F.2d 971, 975 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 969 (1972). From its inception, it has symbolized protest against, as well as support for, our national goals. "[I]t says everything and is big enough to symbolize the variant viewpoints of a Dr. Spock and a General Westmoreland." *Parker* v.

Morgan, 322 F. Supp. 585, 588 (W.D. N.C. 1971). For these reasons, the flag *is* "always 'saying' something." *But see Parker* v. *Morgan, supra*, at 588. "If it did not speak by itself as a symbol of the United States of America, [I] doubt that any state would have sought to protect its message from verbal or physical abuse." *Goguen, supra*, 471 F.2d at 99.

The New Hampshire statute does then affect conduct which embodies communicative content. Although the statute is precisely drawn, it casts a shadow over a substantial field of protest activity. *Goguen, supra*, 471 F.2d at 99-100.

Having decided that the New Hampshire statute does affect a large area of First Amendment activities, I must next determine whether the statute impermissibly restricts those activities. I start with the premise that "many types of flag usage and flag alteration . . . are a . . . means of nonverbal political communication." *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344, 349 (2nd Cir. 1970), *U.S. appeal pending*, 42 U.S.L.W. 3016 (July 10, 1973); *Thoms*[2] v. *Smith*, 334 F. Supp. 1203, 1208 (D. Conn. 1971), *aff'm'd*, 473 F.2d 478 (2nd Cir. 1973). Such communicative activity has always been accorded First Amendment protection. *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969); *Stromberg* v. *California*, 283 U.S. 359 (1931). I agree with the courts in *Thoms* v. *Smith*, 334 F. Supp. 1203 (D. Conn. 1971), and *Crosson* v. *Silver*, 319 F. Supp. 1084 (D. Ariz. 1970), that "it is self-evident that most, if not all, conduct associated with the United States flag is symbolic speech."[2] *Crosson*, 319 F. Supp. at 1086, *Thoms*, 334 F. Supp. at 1208.

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[2] The court in *Hodsdon* v. *Buckson*, 310 F.Supp. 528 (D. Del. 1970), took "judicial notice of the symbolic significance of flying the American flag." 310 F.Supp. at 533.

Although symbolic speech does not enjoy the comprehensive protection afforded pure speech,[3] its regulation must be justified by a state interest other than suppression of free speech and any restrictions must be directed to the nonspeech elements of the activity. Four specific standards for evaluating a state regulation of symbolic speech were set out by the Supreme Court in *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).

1. The regulation must be "within the constitutional power of the Government,"

2. The regulation must "further an important or substantial governmental interest,"

3. The governmental interest must be "unrelated to the suppression of free expression," and

4. "[T]he incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest."

---

[3] When an object is a "pure symbol, such as the flag in *Halter*, the cross, the Star of David, the crescent, the swastika, the hammer and sickle, the red flag in Stromberg v. California, . . . or black armband in *Tinker*, any individualized activity with regard to it outside of the purely logistical activity of maintaining or storing of it is bound to convey a message of fealty or revulsion and is 'closely akin to pure speech.'" *Goguen, supra*, 471 F.2d at 99; *see Hodsdon* v. *Buckson*, 310 F.Supp. 528, 533 (D. Del. 1970). In this regard it may be appropriate to test the State's regulation against the more rigorous standards applicable to governmental interference with pure speech. *See Street* v. *New York*, 394 U.S. 576, 616 (1968) (Fortas, J. dissenting), and *cf. Cantwell* v. *Connecticut*, 310 U.S. 296, 303-04 (1940). Nevertheless, I apply the more lenient *O'Brien* test "with the realization that if the statute cannot meet those standards for constitutionality, it is *a fortiori* unconstitutional if viewed as affecting pure speech." *Goguen, supra*, 471 F.2d 100 n. 18. *See State* v. *Cline*, 305 A.2d 673, —— N.H. —— (filed May 31, 1973).

In addition, the Supreme Court has indicated that there are a limited number of governmental interests which can justify regulation of First Amendment activities in circumstances similar to these. Those governmental interests are:

> (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem. *Street* v. *New York*, 394 U.S. 576, 591 (1968).

Although *Street* involved a limitation on pure speech, I adopt the Court's circumscription of possible governmental interests in that case as applicable here. *Vietnam Moratorium, supra,* 437 F.2d at 349; *Thoms, supra; Crosson, supra.*

While the New Hampshire Supreme Court considered that New Hampshire's interest in preserving the "pristine purity" of the flag provided a constitutional basis satisfactory in the light of the *O'Brien* standards, the State has also argued that the *O'Brien* requirements are satisfied by the State's interest in preventing breaches of the peace. Practically speaking, the former is a declaration of the State's interest in the protection of the physical integrity of the flag. Thus, with the exception of the third interest

mentioned in *Street*, the State has attempted to justify NH RSA 573:2 via all those interests "which might conceivably have been furthered by punishing [petitioner]." *Street, supra*, 394 U.S. at 591-92. I will examine both bases separately under the *O'Brien* standards.

New Hampshire's Interest in Protecting the Physical Integrity of the Flag.

I turn first to the question of whether New Hampshire has the constitutional power to protect the physical integrity of the flag. Earlier Supreme Court cases and a number of lower federal and state court cases have taken the view that a state does have an interest in preserving the physical integrity of the flag. *Halter* v. *Nebraska*, 205 U.S. 34 (1907); *Hoffman* v. *United States*, 256 A.2d 567 (1969); *State* v. *Cline*, 305 A.2d 673, —— N.H. —— (filed May 31, 1973); and *see Goguen* v. *Smith*, 471 F.2d 100 and 100 nn. 18-19.

However, the more recent Supreme Court cases and some lower federal decisions lend authority to the position that "there is no important state interest in protecting the physical integrity of the flag." *Goguen, supra*, 471 F.2d at 102 n. 24. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), stands for the premise that a state may not punish "failure to act affirmatively in a gesture of support for the flag." *Goguen, supra*, 471 F.2d at 101. In *Street*, the Supreme Court, drawing support from *Barnette*, held that verbal abuse of the flag was not punishable. In refusing to uphold *Street's* conviction on the theory that he "failed to show respect for our national symbol," the Court said:

> We have no doubt that the constitutionally guaranteed "freedom to be intellectually . . . diverse or even con-

> trary," and the "right to differ as to things that touch the heart of the existing order," encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous. *Street, supra,* 394 U.S. at 593.

Although *Street* dealt with pure speech, the Court's rationale is applicable here.[4]

> If verbal abuse of the flag cannot be proscribed in an effort to encourage respect for our national symbol, then [I] fail to understand how physical abuse which is visually communicative, the archetype situation which the [New Hampshire] statute reaches, can similarly be forbidden on these nationalistic grounds. *Goguen, supra,* 471 F.2d at 101.

This position is supported by *Tinker* v. *Des Moines School Dist.,* 393 U.S. 503 (1968). In *Tinker,* the Court upheld high school students' rights to protest the Vietnam War by wearing black arm bands to school. Expression of similar views using the national flag should be given at least the same freedom. Other lower federal courts which have dealt with the flag desecration issue have reached this conclusion. Although the statutes examined are not exactly the same as NH RSA 573:2, the curtailment of First Amendment activities and the governmental interests involved are precisely analogous. *See Vietnam Moratorium, supra,* 437 F.2d at 349; *Crosson, supra,* 319 F. Supp. at 1087-88; *Thoms, supra,* 334 F. Supp. at 1210-11.

In summary, then, I believe

> . . . that the rationales of *Barnette* and *Stromberg* together compel the conclusion that the punishment

[4] *See Thoms* v. *Smith,* 334 F.Supp. 1203, 1209 (D. Conn. 1971).

> of peaceful symbolic acts rejecting the political ideas bespoken by the flag is as alien to the mandate of the First Amendment as is compulsion to signify adherence. That this statute proceeds, heedless of the guarantees of that amendment, to proscribe such acts determines its invalidity. *Hodsdon* v. *Buckson*, 310 F.Supp. 528, 535 (D. Ariz. 1970).

Having failed to satisfy the first *O'Brien* standard, it is apparent that New Hampshire's interest in preserving the physical integrity of the flag cannot justify the statute's effect on First Amendment activities. Moreover, even if New Hampshire did have such an interest, NH RSA 573:2 could not thereby be justified; for such an interest would not satisfy the third *O'Brien* standard because it is *not* "unrelated to the suppression of free expression."

New Hampshire's Interest in Preventing Breaches of the Peace

It is the State's contention that NH RSA 573:2 can be justified on the basis that there is a state interest in preventing breaches of the peace. In terms of the *O'Brien* test, the first three steps of the analysis are easily satisfied.

> Obviously . . . a state does have a valid interest in prohibiting conduct which will incite others to commit unlawful acts or provoke retaliatory actions amounting to a breach of the peace.

and

> . . . there can be doubt that the broad [New Hampshire] statute furthers that substantial or important government interest. *Goguen, supra,* 471 F.2d at 102.

Moreover, unlike the Massachusetts statute in *Goguen*, it must be conceded that the enforcement of this statute for the purpose of preserving the peace is "unrelated to the suppression of free expression." *O'Brien, supra,* 391 U.S. at 377. Thus, if NH RSA 573:2 cannot be justified by New Hampshire's interest in preventing breaches of the peace, it must be because the fourth and last step in the *O'Brien* analysis is not satisfied.

The final *O'Brien* standard regulates against overbreadth in otherwise permissible state regulations of First Amendment activities. As the Court in *Goguen* said:

> Since experience has demonstrated the propriety of imposing some restrictions on the exercise of First Amendment rights where substantial government interests are at stake, Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295 (1951), it is of utmost importance that these incidental burdens be no greater than is essential to the furtherance of those interests. *Goguen, supra,* 471 F.2d at 103.

The evil that this standard seeks to avoid is that of a statute which fairly prohibits unlawful conduct, but, at the same time, sweeps under its proscription a wide range of protected First Amendment activities. The question then is: Is the New Hampshire statute "carefully drawn so as not to unduly impair liberty of expression"? *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 574 (1942).

While the New Hampshire statute is not as broad as some of the recently invalidated statutes, it is not so narrowly drawn "as to include within its prohibition only those types of flag desecration which per se are likely to cause breaches of the peace." *Crosson, supra,* 319 F. Supp.

1084, 1088. Unlike other statutes which have been judicially scrutinized, *see e.g.* the statute in *Crosson, supra*, NH RSA 573:2 is not limited to "public" desecration. On oral argument, the State admitted that the statute would apply to a totally private act of sewing a symbol on a flag. Such an act, committed, for instance, in the privacy of one's home, could not possibly provoke a breach of the peace. Additionally, there are acts of desecration covered by NH RSA 573:2 which clearly would not "incite onlookers to commit unlawful acts or provoke others to retaliate and thereby cause a breach of the peace."[5] *Thoms, supra,* 334 F. Supp. 1203, 1209. Since it is not drawn narrowly enough to regulate only that conduct which would result in violence,[6] the New Hampshire statute authorizes

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[5] Interestingly enough, the *Crosson* court, in declaring Arizona's flag desecration statute unconstitutional in 1970, discussed a hypothetical situation very close to the one with which I am presented in this case. The court had this to say:

> It is clear that when a person places on his automobile windshield a flag decal with a peace sign superimposed thereon, he has, in his effort at symbolically expressing his conception of what the flag should stand for, also "defaced" a "representation * * * purporting to be the flag * * * of the United States. * * *" Such an act violates [the statute] and exposes the actor to criminal punishment. Yet we cannot conceive that such an act is likely to provoke the average citizen to angry retaliation. *Crosson, supra,* 319 F.Supp. at 1089.

[6] In *People* v. *Radich,* 26 N.Y.2d 114, 308 N.Y.S.2d 846, 257 N.E.2d 30 (1970), affirmed *per curiam* 401 U.S. 531 (1971), the New York Court of Appeals upheld the conviction of an art dealer who displayed sculpture portraying the flag in a "contemptuous" manner. However, the Court felt that the defendant's conduct amounted to inciting a breach of the peace. The Supreme Court's *per curiam* affirmance, by an equally divided vote, suggests only that "a state may properly prohibit public flag defilement (of the non-speech variety) *which threatens a breach of the public peace.*" *Thoms, supra,* 334 F.Supp. at 1210.

Moreover, the Court in *Radich* did not discuss the *O'Brien* requirement that the restrictions on First Amendment activities be no greater than necessary.

prosecution of First Amendment activity by local law enforcement officials in circumstances where New Hampshire has no valid interest in the prohibition of the activity. *Thoms, supra,* 334 F. Supp. at 1210. I agree with the First Circuit in *Goguen* that

> . . . in the nebulous realm of symbolic speech there is truth in the statement that "the medium is the message" and to suppress the medium is to censor the message [citing cases], especially where it is being conveyed through a passive form of expression. *Goguen, supra,* 471 F.2d at 104.

Although its nature and direction have changed throughout our history, protest has always been an integral theme in the development of our nation's conscience. Symbolic activities having communicative content are an important part of that protest heritage. Absent danger to the health, safety, or welfare of the public, these activities must not be suppressed, even when they are offensive to or critical of the prevailing points of view. And this is especially so where the protest is aimed at the Government. *People* v. *Radich,* 20 N.Y.2d 114, 257 N.E.2d 30, 37 (1970) (dissenting opinion of Fuld, C. J.), *aff'm'd* 401 U.S. 531 (1971). Criticism of the Government should be allowed the widest latitude except under very extraordinary and specified conditions.

The last step in the *Goguen* guidelines requires consideration of two questions: (1) whether the statute can be given "some limiting construction" and/or (2) whether it is "foreseeable" that the New Hampshire courts would constitutionally limit the application of the law. *Goguen, supra,* 471 F.2d at 104. This inquiry leads me through

the same analysis rendered in *Goguen*. Without repeating that analysis here, I note that the statute's infirmity cannot be corrected by a simple excision, *see Street, supra,* nor can I authoritatively construe this statute, where, as here, the "state courts have adopted an 'all or nothing' attitude." *Goguen, supra,* 471 F.2d at 104.

> The advance illimitable threat of criminal sanction which the flag desecration law poses to constitutionally-protected rights of others who may forego those rights can . . . be eliminated only by [my] timely decision. *Goguen, supra,* 471 F.2d at 104.

Although the constitutional infirmities already discussed invalidate petitioner's conviction, a final issue merits attention. As used in NH RSA 573:2, the term "flag" refers to NH RSA 573:1, which defines a "flag" as

> . . . the national flag, or . . . any flag, standard, color, or ensign of the United States, or . . . the flag of this state, or . . . any state flag or ensign of any other state, or . . . any flag or ensign evidently purporting to be either of said flags, standards, colors or ensigns. NH RSA 573:1

Because it incorporates the definition in Section 1, NH RSA 573:2 purports to regulate

> . . . on its face all kinds of posters, buttons, symbols, slogans, and emblems such as have been used for many years in election campaigns, patriotic movements, and so forth. *Vietnam Moratorium, supra,* 437 F.2d at 348.

Without attempting an in-depth analysis, it can easily be seen that NH RSA 573:2, when read in light of NH RSA

573:1, is unconstitutionally overbroad.[1] *See Vietnam Moratorium, supra,* 437 F.2d at 344.

For the foregoing reasons, the writ of habeas corpus will issue after the time for appeal by the State of New Hampshire has elapsed.

So ORDERED.

HUGH H. BOWNES
United States District Judge

December 6, 1973

cc: RICHARD S. KOHN, Esq.
VINCENT P. DUNN, Esq.
ROBERT V. JOHNSON, Esq.
ANTHONY MCMANUS, Esq.

[1] This point was neither briefed nor argued. On the question of petitioner's standing to raise the issue, *see Goguen* v. *Smith,* 471 F.2d 88 (2nd Cir. 1972).

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72–1690

Harold Omand Spence, Appellant, v. State of Washington. } On Appeal from the Supreme Court of Washington.

[June 25, 1974]

PER CURIAM.

Appellant displayed a United States flag, which he owned, out the window of his apartment. Affixed to both surfaces of the flag was a large peace symbol fashioned of removable tape. Appellant was convicted under a Washington statute forbidding the exhibition of a United States flag to which is attached or superimposed figures, symbols, or other extraneous material. The Supreme Court of Washington affirmed appellant's conviction. *State* v. *Spence*, 81 Wash. 2d 788, 506 P. 2d 293 (1973). It rejected appellant's contentions that the statute under which he was charged on its face and as applied contravened the First Amendment, as incorporated by the Fourteenth Amendment, and was void for vagueness. We noted probable jurisdiction. 414 U. S. 815 (1973). We reverse on the ground that as applied to appellant's activity the Washington statute impermissibly infringed protected expression.

I

On May 10, 1970, appellant, a college student, hung his United States flag from the window of his apartment on private property in Seattle, Washington. The flag

was upside down, and attached to the front and back was a peace symbol (*i. e.*, a circle enclosing a trident) made of removable black tape. The window was above the ground floor. The flag measured approximately three by five feet and was plainly visible to passersby. The peace symbol occupied roughly half of the surface of the flag.

Three Seattle police officers observed the flag and entered the apartment house. They were met at the main door by appellant, who said, "I suppose you are here about the flag. I didn't know there was anything wrong with it. I will take it down." Appellant permitted the officers to enter his apartment, where they seized the flag and arrested him. Appellant cooperated with the officers. There was no disruption or altercation.

Appellant was not charged under Washington's flag desecration statute. See Wash. Rev. Code § 9.86.030, as amended.[1] Rather, the State relied on the so-called "improper use" statute, Wash. Rev. Code § 9.86.020. This statute provides, in pertinent part:

> "No person shall, in any manner, for exhibition or display:
>
> "(1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state . . . or
>
> "(2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed

[1] This statute provides in part:

"No person shall knowingly cast contempt upon any flag, standard, color, ensign or shield . . . by publicly mutilating, defacing, defiling, burning, or trampling upon said flag, standard, color, ensign or shield."

or annexed any such word, figure, mark, picture, design, drawing, or advertisement . . . ." [2]

Appellant initially was tried to the bench in a local justice court, where he was found guilty and sentenced to 90 days' confinement, with 60 days suspended. Appellant exercised his right to be tried *de novo* in King County Superior Court, where he received a jury trial.

The State based its case on the flag itself and the testimony of the three arresting officers, who testified that they had observed the flag displayed from appellant's window and that on the flag was superimposed what they identified as a peace symbol. Appellant took the stand in his own defense. He testified that he put a peace symbol on the flag and displayed it to public view as a protest to the invasion of Cambodia and the killings at Kent State University, events which occurred a few days prior to his arrest. He said that his purpose was to associate the American flag with peace instead of war and violence:

> "I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace."

Appellant further testified that he chose to fashion the peace symbol from tape so that it could be removed with-

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[2] Wash. Rev. Code § 9.86.010 defines the flags and other symbols protected by the desecration and improper use statutes as follows: "The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof."

out damaging the flag. The State made no effort to controvert any of appellant's testimony.

The trial court instructed the jury in essence that the mere act of displaying the flag with the peace symbol attached, if proven beyond a reasonable doubt, was sufficient to convict. There was no requirement of specific intent to do anything more than display the flag in that manner. The jury returned a verdict of guilty. The court sentenced appellant to 10 days in jail, suspended, and to a $75 fine. The Washington Court of Appeals reversed the conviction. 5 Wash. App. 752, 490 P. 2d 1321 (1971). It held the improper use statute overbroad and invalid on its face under the First and Fourteenth Amendments. With one justice dissenting and two concurring in the result, the Washington Supreme Court reversed and reinstated the conviction. 81 Wash. 2d 788, 506 P. 2d 293 (1973).

II

A number of factors are important in the instant case. First, this was a privately-owned flag. In a technical property sense it was not the property of any government. We have no doubt that the state or national governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property. But this is a different case. Second, appellant displayed his flag on private property. He engaged in no trespass or disorderly conduct. Nor is this a case that might be analyzed in terms of reasonable time, place or manner restraints on access to a public area. Third, the record is devoid of proof of any risk of breach of the peace. It was not appellant's purpose to incite violence or even stimulate a public demonstration. There is no evidence that any crowd gathered or that appellant made any effort to attract attention beyond hanging the flag out

of his own window. Indeed, on the facts stipulated by the parties there is no evidence that anyone other than the three police officers observed the flag.

Fourth, the State concedes, as did the Washington Supreme Court, that appellant engaged in a form of communication.[3] Although the stipulated facts fail to show that any member of the general public viewed the flag, the State's concession is inevitable on this record. The undisputed facts are that appellant "wanted people to know that I thought America stood for peace." To be sure, appellant did not choose to articulate his views through printed or spoken words. It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments, for as the Court noted in *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968), "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." But the nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.

The Court for decades has recognized the communicative connotations of the use of flags. *E. g., Stromberg* v. *California*, 283 U. S. 359 (1931). In many of their uses flags are a form of symbolism comprising a "primitive but effective way of communicating ideas . . . ," and "a short cut from mind to mind." *Board of Education* v. *Barnette*, 319 U. S. 624, 632 (1943). On this record there can be little doubt that appellant communicated through the use of symbols. The symbolism included

[3] Brief for Appellee 3; 81 Wash. 2d, at 799, 800, 506 P. 2d, at 300, 301.

not only the flag but also the superimposed peace symbol.

Moreover, the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol. See *Tinker* v. *Des Moines School District*, 393 U. S. 503 (1969). In *Tinker*, the wearing of black armbands in a school environment conveyed an unmistakable message about a contemporaneous issue of intense public concern—the Vietnam hostilities. *Id.*, at 505–514. In this case, appellant's activity was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment. Cf. *Scheuer* v. *Rhodes*, — U. S. — (1974). A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it.

It may be noted, further, that this was not an act of mindless nihilism. Rather, it was a pointed expression of anguish by appellant about the then current domestic and foreign affairs of his government. An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.

We are confronted then with a case of prosecution for the expression of an idea through activity. Moreover, the activity occurred on private property, rather than in an environment over which the state by necessity must have certain supervisory powers unrelated to expression. Cf. *Procunier* v. *Martinez*, — U. S. — (1974); *Healy* v. *James*, 408 U. S. 169 (1972); *Tinker* v. *Des Moines School District*, *supra*. Accordingly, we must examine with particular care the interests advanced by appellee to support its prosecution.

We are met at the outset with something of an enigma in the manner in which the case was presented to us. The Washington Supreme Court rejected any reliance on a breach-of-the-peace rationale. 81 Wash. 2d, at 796, n. 1, 506 P. 2d, at 299, n. 1. It based its result primarily on the ground that "the nation and state both have a recognizable interest in preserving the flag as a symbol of the nation . . . ."[4] Yet counsel for the State declined to support the highest state court's principal rationale in argument before us.[5] He pursued instead the breach-of-the-peace theory discarded by the state court. Indeed, that was the only basis on which he chose to support the constitutionality of the state statute.

Despite counsel's approach, we think it appropriate to review briefly the range of various state interests that might be thought to support the challenged conviction, drawing upon the arguments before us, the opinions below, and the Court's opinion in *Street* v. *New York*, 394 U. S. 576, 590–594 (1969). The first interest at issue is prevention of breach of the peace. In our view, the Washington Supreme Court correctly rejected this notion. It is totally without support in the record.

We are also unable to affirm the judgment below on the ground that the State may have desired to protect the sensibilities of passersby. "It is firmly settled that under our Constitution the public expression of ideas

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[4] 81 Wash. 2d, at 799, 506 P. 2d, at 300. A subsidiary ground relied on by the Washington Supreme Court must be rejected summarily. It found the inhibition on appellant's freedom of expression "miniscule and trifling" because there are "thousands of other means available to [him] for the dissemination of his personal views . . . ." 81 Wash. 2d, at 799, 800, 506 P. 2d, at 300, 301. As the Court noted in, *e. g.*, *Schneider* v. *State*, 308 U. S. 147, 163 (1939), "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

[5] Brief for Appellee 6; Tr. of Oral Arg. 31–32.

may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *New York*, *supra*, at 592. Moreover, appellant did not impose his ideas upon a captive audience. Anyone who might have been offended could easily have avoided the display. See *Cohen* v. *California*, 403 U. S. 15 (1971). Nor may appellant be punished for failing to show proper respect for our national emblem. *Street* v. *New York*, *supra*, at 593; *Board of Education* v. *Barnette*, *supra*.[6]

We are brought, then, to the state court's thesis that Washington has an interest in preserving the national flag as an unalloyed symbol of our country. The court did not define this interest; it simply asserted it. See 81 Wash. 2d, at 799, 506 P. 2d, at 300. The dissenting opinion today, see *post* at —, adopts essentially the same approach. Presumably, this interest might be seen as an effort to prevent the appropriation of a revered national symbol by an individual, interest group, or enterprise where there was a risk that association of the symbol with a particular product or viewpoint might be taken erroneously as evidence of governmental endorsement.[7] Alternatively, it might be argued that the inter-

[6] Counsel for the State conceded that promoting respect for the flag is not a legitimate state interest. Tr. of Oral Arg. 30.

[7] Undoubtedly such a concern underlies that portion of the improper use statute forbidding the utilization of representations of the flag in a commercial context. Indeed, the third subparagraph of the improper use statute, Wash. Rev. Code § 9.86.020 (3), which is not at issue here, is aimed directly at commercial exploitation of our national symbol. There is no occasion in this case to address the application of the challenged statute to commercial behavior. Cf. *Halter* v. *Nebraska*, 205 U. S. 34 (1907). The dissent places major reliance on *Halter*, see *post*, pp. —, despite the fact that *Halter* was decided nearly 20 years before the Court concluded that the First Amendment applies to the States by virtue of the Fourteenth Amendment. See *Gitlow* v. *New York*, 268 U. S. 652 (1925).

est asserted by the state court is based on the uniquely universal character of the national flag as a symbol. For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America. For others the flag carries in varying degrees a different message. "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *Board of Education* v. *Barnette, supra,* at 632–633. It might be said that we all draw something from our national symbol, for it is capable of conveying simultaneously a spectrum of meanings. If it may be destroyed or permanently disfigured, it could be argued that it will lose its capability of mirroring the sentiments of all who view it.

But we need not decide in this case whether the interest advanced by the court below is valid.[8] We assume *arguendo* that it is. The statute is nonetheless unconstitutional as applied to appellant's activity.[9] There

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[8] If this interest is valid, we note that it is directly related to expression in the context of activity like that undertaken by appellant. For that reason and because no other governmental interest unrelated to expression has been advanced or can be supported on this record, the four-step analysis of *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968), is inapplicable.

[9] Because we agree with appellant's as-applied argument, we do not reach the more comprehensive overbreadth contention he also advances. But it is worth noting the nearly limitless sweep of the Washington improper use flag statute. Read literally, it forbids a veteran's group from attaching, *e. g.,* battalion commendations to a United States flag. It proscribes photographs of war heroes standing in front of the flag. It outlaws newspaper mastheads com-

was no risk that appellant's acts would mislead viewers into assuming that the Government endorsed his viewpoint. To the contrary, he was plainly and peacefully [10] protesting the fact that it did not. Appellant was not charged under the desecration statute, see n. 1 *supra*, nor did he permanently disfigure the flag or destroy it. He displayed it as a flag of his country in a way closely analogous to the manner in which flags have always been used to convey ideas. Moreover, his message was direct, likely to be understood, and within the contours of the First Amendment. Given the protected character of

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posed of the national flag with superimposed print. Other examples could easily be listed.

Statutes of such sweep suggest problems of selective enforcement. We are, however, unable to agree with appellant's void-for-vagueness argument. The statute's application is quite mechanical, particularly when implemented with jury instructions like the ones given in this case. The law in Washington, simply put, is that *nothing* may be affixed to or superimposed on a United States flag or a representation thereof. Thus, if selective enforcement has occurred, it has been a result of prosecutorial discretion, not the language of the statute. Accordingly, this case is unlike *Smith* v. *Goguen*, — U. S. — (1974), where the words of the statute at issue ("publicly . . . treats contemptuously") were themselves sufficiently indefinite to prompt subjective treatment by prosecutorial authorities.

[10] Appellant's activity occurred at a time of national turmoil over the introduction of United States forces into Cambodia and the deaths at Kent State University. It is difficult now, more than four years later, to recall vividly the depth of emotion that pervaded most colleges and universities at the time, and that was widely shared by young Americans everywhere. A spontaneous outpouring of feeling resulted in widespread action, not all of it rational when viewed in retrospect. This included the closing down of some schools, as well as other disruptions of many centers of education. It was against this highly inflamed background that appellant chose to express his own views in a manner that can fairly be described as gentle and restrained as compared to the actions undertaken by a number of his peers.

his expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately-owned flag was significantly impaired on these facts, the conviction must be invalidated.[11]

The judgment is reversed.

It is so ordered.

MR. JUSTICE BLACKMUN concurs in the result.

[11] The similarity of our holding to that of the Iowa Supreme Court in *State* v. *Kool*, 212 N. W. 2d 518 (1973), merits note. In that case, the defendant displayed a replica of the United States flag upside down in his window, superimposing a peace symbol to create an effect identical to that achieved by Spence. Recognizing the communicative character of the defendant's activity, the Iowa Supreme Court reversed his conviction for flag misuse and held the statute unconstitutional as applied. The court eschewed an overbreadth analysis, and it rejected a number of the state interests we have found unavailing in the instant case.

SUPREME COURT OF THE UNITED STATES

No. 72–1690

Harold Omand Spence, Appellant, *v.* State of Washington. | On Appeal from the Supreme Court of Washington.

[June 25, 1974]

MR. JUSTICE DOUGLAS, concurring.

I would affirm the judgment for substantially the same reasons given by the Iowa Supreme Court in *State* v. *Kool*, 212 N. W. 2d 518 (Iowa). In that case the defendant hung a peace symbol made of cardboard and wrapped in tin foil in the window of his home and hung a replica of the United States flag behind the peace symbol but in an upsidedown position. The state statute made it a crime to "cast contempt upon, satirize, deride or burlesque the flag," IA. Code § 32.1.

The Court held that defendant's conduct constituted "symbolic speech." The Court in reversing the conviction said:

> "Someone in Newton might be so intemperate as to disrupt the peace because of this display. But if absolute assurance of tranquility is required, we may as well forget about free speech. Under such a requirement, the only 'free' speech would consist of platitudes. That kind of speech does not need constitutional protection."

That view is precisely my own. Hence I concur in reversing this judgment of conviction.

SUPREME COURT OF THE UNITED STATES

No. 72–1690

Harold Omand Spence, Appellant, *v.* State of Washington.	On Appeal from the Supreme Court of Washington.

[June 25, 1974]

MR. CHIEF JUSTICE BURGER, dissenting.

If the constitutional role of this Court were to strike down unwise laws or restrict unwise application of some laws, I could agree with the result reached by the Court. That is not our function, however, and it should be left to each state and ultimately the common sense of its people to decide how the flag, as a symbol of national unity, should be protected.

SUPREME COURT OF THE UNITED STATES

No. 72-1690

Harold Omand Spence, Appellant, v. State of Washington. | On Appeal from the Supreme Court of Washington.

[June 25, 1974]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, dissenting.

The Court holds that a Washington statute prohibiting persons from attaching material to the American flag was unconstitutionally applied to petitioner. Although I agree with the Court that petitioner's activity was a form of communication, I do not agree that the First Amendment prohibits the State from restricting this activity in furtherance of other important interests. And I believe the rationale by which the Court reaches its conclusion is unsound.

"The right of free speech is not absolute at all times and under all circumstances." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942). This Court has long recognized, for example, that some forms of expression are not entitled to any protection at all under the First Amendment, despite the fact that they could reasonably be thought protected under its literal language. See *Roth* v. *United States*, 354 U. S. 476 (1957). The Court has further recognized that even protected speech may be subject to reasonable limitation when important countervailing interests are involved. Citizens are not completely free to commit perjury, to libel other citizens, to infringe copyrights, to incite riots, or to interfere unduly with passage through a public thoroughfare. The right of free speech, though precious,

remains subject to reasonable accommodation to other valued interests.

Since a State concededly may impose some limitations on speech directly, it would seem to follow *a fortiori* that a State may legislate to protect important state interests even though an incidental limitation on free speech results. Virtually any law enacted by a State, when viewed with sufficient ingenuity, could be thought to interfere with some citizen's preferred means of expression. But no one would argue, I presume, that a State could not prevent the painting of public buildings simply because a particular class of protesters believed their message would best be conveyed through that medium. Had petitioner here chosen to tape his peace symbol to a federal courthouse, I have little doubt that he could be prosecuted under a statute properly drawn to protect public property.

Yet the Court today holds that the State of Washington cannot limit use of the American flag, at least insofar as its statute prevents petitioner from using a privately-owned flag to convey his personal message. Expressing its willingness to assume, *arguendo*, that Washington has a valid interest in preserving the integrity of the flag, the Court nevertheless finds that interest to be insufficient in this case. To achieve this result the Court first devalues the State's interest under these circumstances, noting that "no interest the State may have in preserving the physical integrity of a privately-owned flag was significantly impaired on these facts . . . ." The Court takes pains to point out that petitioner did not "permanently disfigure the flag or destroy it," and emphasizes that the flag was displayed "in a way closely analogous to the manner in which flags have always been used to convey ideas." The Court then restates the notion that such state interests are secondary to messages which are "direct, likely to

be understood, and within the contours of the First Amendment." *Ante*, p. 10. In my view the first premise demonstrates a total misunderstanding of the State's interest in the integrity of the American flag, and the second premise places the Court in the position either of ultimately favoring petitioner's message because of its subject matter, a position about which almost all members of the majority have only recently expressed doubt, or, alternatively, of making the flag available for a limitless succession of political and commercial messages. I shall treat these issues in reverse order.

The statute under which petitioner was convicted is no stranger to this Court, a virtually identical statute having been before the Court in *Halter* v. *Nebraska*, 205 U. S. 34 (1907). In that case the Court held that the State of Nebraska could enforce its statute to prevent use of a flag representation on beer bottles, stating flatly that "a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige . . . ." 205 U. S., at 42. The Court then continued: "Such a use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an enblem of National power and National honor." 205 U. S., at 42.

The Court today finds *Halter* irrelevant to the present case, pointing out that it was decided almost 20 years before the First Amendment was applied to the States and further noting that it involved "commercial behavior," a form of expression the Court presumably will consider another day.[1] Insofar as *Halter* assesses the

[1] The Court states in a footnote: "There is no occasion in this case to address the application of the challenged statute to commercial behavior. Cf. *Halter* v. *Nebraska*, 205 U. S. 34 (1907)." *Ante*, p. 8, n. 7.

State's interest, of course, the Court's argument is simply beside the point. But even as the argument relates to petitioner's interest, I find it somewhat difficult to grasp. The Court may possibly be suggesting that political expression deserves greater protection than other forms of expression, but that suggestion would seem quite inconsistent with the position taken by nearly all members of today's majority in *Lehman* v. *Shaker Heights*, — U. S. — (1974) (DOUGLAS, J., concurring in judgment) (BRENNAN, J., dissenting),[2] also handed down today. Yet if the Court is suggesting that *Halter* would now be decided differently, and that the State's interest in the flag falls before any speech which is "direct, likely to be understood, and within the contours of the First Amendment," that view would mean the flag could be auctioned as a background to anyone willing and able to buy or

[2] The plurality opinion of MR. JUSTICE BLACKMUN took the position that a ban against political advertising on publicly owned buses was not unconstitutional since "[n]o First Amendment forum is here to be found." MR. JUSTICE DOUGLAS, concurring in the result, stated that petitioner in that case had no "constitutional right to spread his message before this captive audience," but specifically noted:

"I do not view the content of the message as relevant either to petitioner's right to express it or to the commuters' right to be free from it. Commercial advertisements may be as offensive and intrusive to captive audiences as any political message." MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL joined, dissenting, stated: "There is some doubt concerning whether the 'commercial speech' distinction announced in *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), retains continuing validity," referring to MR. JUSTICE DOUGLAS' concurring opinion in *Cammarano* v. *United States*, 358 U. S. 498, 514 (1959). The dissent further stated: "Once a public forum for communication has been established, both free speech and equal protection principles prohibit discrimination based *solely* upon subject matter or content." (Emphasis in original.)

copy one. I find it hard to believe the Court intends to presage that result.

Turning to the question of the State's interest in the flag, it seems to me that the Courts treatment lacks all substance. The suggestion that the State's interest somehow diminishes when the flag is decorated with *removable* tape trivializes something which is not trivial. The State of Washington is hardly seeking to protect the flag's resale value, and yet the Court's emphasis on the lack of actual damage to the flag suggests that this is a significant aspect of the State's interest. Surely the Court does not mean to imply that petitioner *could* be prosecuted if he subsequently tore the flag in the process of trying to take the tape off. Unlike flag desecration statutes, which the Court correctly notes are not at issue in this case, the Washington statute challenged here seeks to prevent personal *use* of the flag, not simply particular forms of *abuse*. The State of Washington has chosen to set the flag apart for a special purpose, and has directed that it not be turned into a common background for an endless variety of superimposed messages. The physical condition of the flag itself is irrelevant to that purpose.

The true nature of the State's interest in this case is not only one of preserving "the physical integrity of the flag," [3] but also one of preserving the flag as "an important symbol of nationhood and unity." [4] Although the Court treats this important interest with a studied inattention, it is hardly one of recent invention and has previously been accorded considerable respect by this Court. In *Halter*, for example, the Court stated:

> "As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism

[3] *Smith* v. *Goguen*, — U. S. — (1974) (BLACKMUN, J., dissenting).

[4] *Ibid.* (WHITE, J., concurring in judgment.)

> among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected." 205 U. S., at 43.

There was no question in *Halter* of physical impairment of a flag since no actual flag was even involved. And it certainly would have made no difference to the Court's discussion of the State's interest if the petitioner in that case had chosen to advertise his product by decorating the flag with beer bottles fashioned from some removable substance.[5] It is the character, not the cloth, of the flag which the State seeks to protect.

The value of this interest has been emphasized in recent as well as distant times. Mr. Justice Fortas, for example, noted in *Street* v. *New York*, 394 U. S. 576, 616 (1969), that "the flag is a special kind of personalty," a form of property "burdened with peculiar obligations and restrictions." *Id.*, at 617.[6] Mr. Justice White has observed that "the flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it." *Smith* v. *Goguen*, — U. S. — (1974) (concurring opinion). I agree. What petitioner here seeks is simply license to use the flag however he

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[5] It should be noted that *Halter* makes no mention of the argument that allowing use of the flag for a personal or commercial purpose might suggest endorsement of that purpose by the government. While this might be an *additional* state interest in appropriate cases, it is by no means an indispensable element of the State's concern about the integrity of the flag.

[6] The majority of the Court in *Street* stated: "We add that disrespect for our flag is to be deplored no less in these vexed times than in calmer periods of our history," 394 U. S., at 594, citing *Halter*.

pleases, so long as the activity can be tied to a concept of speech, regardless of any state interest in having the flag used only for more limited purposes. I find no reasoning in the Court's opinion which convinces me that the Constitution requires such license to be given.

The fact that the State has a valid interest in preserving the character of the flag does not mean, of course, that it can employ all conceivable means to enforce it. It certainly could not require all citizens to own the flag or compel citizens to salute one. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943). It presumably cannot punish criticism of the flag, or the principles for which it stands, anymore than it could punish criticism of this country's policies or ideas. But the statute in this case demands no such allegiance. Its operation does not depend upon whether the flag is used for communicative or noncommunicative purposes; upon whether a particular message is deemed commercial or political; upon whether the use of the flag is respectful or contemptuous; or upon whether any particular segment of the State's citizenry might applaud or oppose the intended message.[1] It simply withdraws a unique national symbol from the roster of materials that may be used as a background for communications. Since I do not believe the Constitution prohibits Washington from making that decision, I dissent.

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[1] It is quite apparent that the Court does have considerable sympathy for at least the *form* of petitioner's message, describing his use of the flag as "a pointed expression of anguish," *ante*, p. 6, and commenting that "appellant chose to express his own views in a manner that can fairly be described as gentle and restrained as compared to the actions undertaken by a number of his peers." *Ante*, p. 10, n. 10. One would hope that this last observation does not introduce a doctrine of "comparative" expression, which gives more leeway to certain forms of expression when more destructive methods of expression are being employed by others.